Transcripts

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Supreme Court U. State

vs

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460-575

Motion to dismiss Dec. 12th

Rule 12 — 463

Ranted

Submitted

Dismissed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 998.

G. DE ROSSET LAMAR, EXECUTOR OF GAZAWAY B. LAMAR, DECEASED, APPELLANT,

vs.

MARY J. C. MICOU, ADMINISTRATRIX OF ANN C. SIMS, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 10, 1881.

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1 *Summons for relief.*

New York supreme court.

ANN C. SIMS, PLAINTIFF,
against
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased, defendant.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at their office, No. 50 Wall street, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated July 1, 1875.

NASH & HOLT,
Plaintiff's Attorneys.

2 *Complaint.*

New York supreme court, county of New York.

ANN C. SIMS, PLAINTIFF,
against
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased, defendant.

The plaintiff, by Nash & Holt, her attorneys, alleges:

I. That on December 11, 1855, the plaintiff was a resident of the county of Richmond, in the State of New York, and a minor under the age of fourteen years, being about four years of age, and the daughter of Margaret C. Abercrombie; that on or about said date, said Margaret C. Abercrombie duly made application to the surrogate of said county of Richmond by petitioner duly verified, setting forth in substance the facts hereinbefore alleged, and that plaintiff was entitled to personal property of the value of about five thousand dollars, and praying that said surrogate would appoint Gazaway B. Lamar, then of the city of Brooklyn, in said State, guardian of the person and estate of plaintiff; that thereupon said Gazaway B. Lamar duly consented, in writing, to become the guardian of plaintiff, and duly executed a bond, with security, approved by said surrogate, as required from guardians by the statute in such case provided, as by reference to said petition, consent, and bond, on file in the office of said surrogate, will more fully appear.

3 II. That thereupon and thereafter such proceedings were had upon such application, that on or about December 21, 1855, by letters of guardianship duly granted by said surrogate, dated upon said date, said Gazaway B. Lamar was duly appointed general guardian of the person and estate of plaintiff, and was thereby and by law required, among other things, to render a just and true account of

all moneys and property of plaintiff, secured by said guardian, and of the application thereof, and of his guardianship in all respects to any court having cognizance thereof, when thereunto required, as by reference to said letters of guardianship, now of record in the office of said surrogate, will more fully appear.

III. That thereupon and on or about January 1, 1856, there was delivered to said Gazaway B. Lamar, as such guardian of plaintiff, and the said Gazaway B. Lamar, as such guardian of plaintiff, accepted and took into his own possession, custody, and control, all the property of plaintiff, being more than five thousand dollars in cash and other property.

IV. That on or about October 5, 1874, said Gazaway B. Lamar died at New York City, leaving a will in which the defendant, with other persons, was nominated an executor thereof; that on or about November 10, 1874, said will was duly admitted to probate, and letters testamentary thereon were duly granted and issued to the defendant herein, as executor thereof, by the surrogate of the county of New York, to whom jurisdiction in that behalf belonged; that defendant thereupon qualified as such executor and entered upon the duties of his office, and that none of the other persons nominated as executors in said will have qualified or are acting as executors thereof.

V. That the said Gazaway B. Lamar did not during his life-time, nor has the defendant as such executor or otherwise ever rendered an account of the said guardianship of Gazaway B. Lamar to the surrogate of the county of Richmond, or to any court having cognizance thereof, or to the plaintiff herein; that the plaintiff is now of full age, and that after plaintiff was of full age, and before the death of said
4 Gazaway B. Lamar, a demand was duly made upon said Gazaway B. Lamar, and since his death a demand has been duly made upon defendant as such executor as aforesaid in behalf of plaintiff, that he render a just and true account to the plaintiff of all moneys and property secured by said Gazaway B. Lamar, as guardian as aforesaid, and of the application thereof, and of his guardianship in all respects, but that the said Gazaway B. Lamar in his life-time wholly neglected, and the defendant herein as executor as aforesaid has hitherto wholly neglected so to do.

Wherefore plaintiff prays:

I. That the defendant, as executor as aforesaid, render a just and true account of all moneys and property of the plaintiff secured by the said Gazaway B. Lamar as guardian of plaintiff during his life-time, and of the application thereof, and of his guardianship in all respects; and that an account be taken of all the transactions of said Gazaway B. Lamar as such guardian of plaintiff; and that defendant as executor as aforesaid account to plaintiff for all the property, assets and effects of plaintiff which passed into defendant's possession as executor as aforesaid upon the death of said Gazaway B. Lamar.

II. That plaintiff have judgment against defendant, as executor as aforesaid, for the balance found to be due to plaintiff upon said accounting.

III. For such other relief as may be just, with the costs and disbursements of this action.

NASH & HOLT,
Plaintiff's Attorneys.

5 At a special term of the supreme court of the State of New York, held in and for the county of New York, at chambers at

the county court-house, in the city of New York, on the 9th day of October, 1875:

Present, Hon. A. R. Lawrence, justice.

ANN C. SIMS, PLAINTIFF,
vs.
G. DE R. LAMAR, AS EXECUTOR, &c., defendant.

On reading and filing the petition of G. De R. Lamar, executor, &c., defendant above-named, dated October 9th, 1875, praying for the removal of the above-entitled cause into the United States circuit court for the southern district of New York, pursuant to the statute of the United States in such case made and provided; and the said petitioner having offered good and sufficient security, pursuant to the directions of and as required by said statute;

6 And it appearing to the satisfaction of this court that the above-entitled suit is commenced in this court by a citizen of the State of Alabama against a citizen of this State, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs:

It is therefore hereby declared and ordered, that this court accepts the surety offered by the petitioner; and that the said cause be, and it is hereby, removed for trial into the next circuit court of the United States to be held in the southern district of New York, pursuant to the said statute; and that this court do proceed no further therein; and that all proceedings in this court in said cause be, and the same are hereby, stayed.

7 United States circuit court, southern district of New York.

ANN C. SIMS, PLAINTIFF,
against
G. DE ROSSET LAMAR, AS EXECUTOR, ETC., of Gazaway B. Lamar, deceased, defendant.

The answer of G. De R. Lamar, executor, etc., defendant above named to the complaint of Ann C. Sims, plaintiff in the above-entitled cause.

This defendant, in answering the complaint of the plaintiff in the above-entitled cause, says:

First. That the said Gazaway B. Lamar was a citizen of the State of Georgia, and the said Ann C. Sims was a citizen of the State of Alabama, having a temporary residence in the city of New York in the year 1855, when the said Gazaway B. Lamar was appointed guardian of the said Ann C. Sims, as set forth in the complaint herein.

Second. And this defendant, further answering, says that in the year 1861 the States of Georgia and Alabama, by acts of their legislatures, declared themselves to have seceded from the United States,

8 and to constitute members of the so-called Confederate States of America; whereupon a state of war arose between the United States of America and the Confederate States of America, which continued to be flagrant for more than four years after the spring of 1861.

Third. And this defendant, in further answering says, that the said Gazaway B. Lamar and Ann C. Sims were, in the spring of 1861, citizens and residents of the States of Georgia and Alabama respectively, and

all moneys and property of plaintiff, secured by said guardian, and of the application thereof, and of his guardianship in all respects to any court having cognizance thereof, when thereunto required, as by reference to said letters of guardianship, now of record in the office of said surrogate, will more fully appear.

III. That thereupon and on or about January 1, 1856, there was delivered to said Gazaway B. Lamar, as such guardian of plaintiff, and the said Gazaway B. Lamar, as such guardian of plaintiff, accepted and took into his own possession, custody, and control, all the property of plaintiff, being more than five thousand dollars in cash and other property.

IV. That on or about October 5, 1874, said Gazaway B. Lamar died at New York City, leaving a will in which the defendant, with other persons, was nominated an executor thereof; that on or about November 10, 1874, said will was duly admitted to probate, and letters testamentary thereon were duly granted and issued to the defendant herein, as executor thereof, by the surrogate of the county of New York, to whom jurisdiction in that behalf belonged; that defendant thereupon qualified as such executor and entered upon the duties of his office, and that none of the other persons nominated as executors in said will have qualified or are acting as executors thereof.

V. That the said Gazaway B. Lamar did not during his life-time, nor has the defendant as such executor or otherwise ever rendered an account of the said guardianship of Gazaway B. Lamar to the surrogate of the county of Richmond, or to any court having cognizance thereof, or to the plaintiff herein; that the plaintiff is now of full age, and that after plaintiff was of full age, and before the death of said
4 Gazaway B. Lamar, a demand was duly made upon said Gazaway B. Lamar, and since his death a demand has been duly made upon defendant as such executor as aforesaid in behalf of plaintiff, that he render a just and true account to the plaintiff of all moneys and property secured by said Gazaway B. Lamar, as guardian as aforesaid, and of the application thereof, and of his guardianship in all respects, but that the said Gazaway B. Lamar in his life-time wholly neglected, and the defendant herein as executor as aforesaid has hitherto wholly neglected so to do.

Wherefore plaintiff prays:

I. That the defendant, as executor as aforesaid, render a just and true account of all moneys and property of the plaintiff secured by the said Gazaway B. Lamar as guardian of plaintiff during his life-time, and of the application thereof, and of his guardianship in all respects; and that an account be taken of all the transactions of said Gazaway B. Lamar as such guardian of plaintiff; and that defendant as executor as aforesaid account to plaintiff for all the property, assets and effects of plaintiff which passed into defendant's possession as executor as aforesaid upon the death of said Gazaway B. Lamar.

II. That plaintiff have judgment against defendant, as executor as aforesaid, for the balance found to be due to plaintiff upon said accounting.

III. For such other relief as may be just, with the costs and disbursements of this action.

NASH & HOLT,
Plaintiff's Attorneys.

5 At a special term of the supreme court of the State of New York, held in and for the county of New York, at chambers at

the county court-house, in the city of New York, on the 9th day of October, 1875:

Present, Hon. A. R. Lawrence, justice.

ANN C. SIMS, PLAINTIFF,
vs.
G. DE R. LAMAR, AS EXECUTOR, &c., defendant.

On reading and filing the petition of G. De R. Lamar, executor, &c., defendant above-named, dated October 9th, 1875, praying for the removal of the above-entitled cause into the United States circuit court for the southern district of New York, pursuant to the statute of the United States in such case made and provided; and the said petitioner having offered good and sufficient security, pursuant to the directions of and as required by said statute;

6 And it appearing to the satisfaction of this court that the above-entitled suit is commenced in this court by a citizen of the State of Alabama against a citizen of this State, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs:

It is therefore hereby declared and ordered, that this court accepts the surety offered by the petitioner; and that the said cause be, and it is hereby, removed for trial into the next circuit court of the United States to be held in the southern district of New York, pursuant to the said statute; and that this court do proceed no further therein; and that all proceedings in this court in said cause be, and the same are hereby, stayed.

7 United States circuit court, southern district of New York.

ANN C. SIMS, PLAINTIFF,
against
G. DE ROSSET LAMAR, AS EXECUTOR, ETC., of Gazaway B. Lamar, deceased, defendant.

The answer of G. De R. Lamar, executor, etc., defendant above named to the complaint of Ann C. Sims, plaintiff in the above-entitled cause.

This defendant, in answering the complaint of the plaintiff in the above-entitled cause, says:

First. That the said Gazaway B. Lamar was a citizen of the State of Georgia, and the said Ann C. Sims was a citizen of the State of Alabama, having a temporary residence in the city of New York in the year 1855, when the said Gazaway B. Lamar was appointed guardian of the said Ann C. Sims, as set forth in the complaint herein.

Second. And this defendant, further answering, says that in the year 1861 the States of Georgia and Alabama, by acts of their legislatures, declared themselves to have seceded from the United States,

8 and to constitute members of the so-called Confederate States of Americea; whereupon a state of war arose between the United States of America and the Confederate States of America, which continued to be flagrant for more than four years after the spring of 1861.

Third. And this defendant, in further answering says, that the said Gazaway B. Lamar and Ann C. Sims were, in the spring of 1861, citizens and residents of the States of Georgia and Alabama respectively, and

citizens of the Confederate States of America, and were engaged in aiding and abetting the State of Georgia and the so-called Confederate States of America in their rebellion against the United States of America, and so continued to aid and abet till the month of January, 1865.

Fourth. And this defendant, in further answering, says that the United States of America, by various public acts, declared all the estate and property, money, stocks, and credits of any kind belonging to the said Gazaway B. Lamar and the said Ann C. Sims to be liable to seizure and confiscable by the United States of America; and at the same time the said Gazaway B. Lamar and Ann C. Sims were, by the various acts of Congress of the United States, outlawed and debarred of any access to any court of the United States, whereby it was impossible for the said Gazaway B. Lamar to appear in the surrogate's court of Richmond County to settle and close his accounts there, and to be discharged from his liability as guardian of the said Ann C. Sims; in consequence whereof the relation of guardian and ward ceased and determined so far as the same depended upon the order or decree of the surrogate's court of Richmond County.

Fifth. And this defendant, in further answering, says that for the purpose of saving the money and property of the said Ann C. Sims from seizure and confiscation by the United States, the said Gazaway B. Lamar, at the request of the said Ann C. Sims and of her natural guardians, all citizens of the State of Alabama, withdrew the funds belonging to the said Ann C. Sims from the city of New York, where they were declared to be forfeited and confiscated as aforesaid, and
9 invested the same for the benefit and account of the said Ann C. Sims in such securities as by the laws of the States of Alabama and Georgia and of the Confederate States of America he might lawfully do.

Sixth. And this defendant, in further answering, says that afterwards and on the 15th day of March, 1867, at the written request of the said Ann C. Sims and of her natural guardians, one Benjamin H. Micou was appointed legal guardian of the said Ann C. Sims by the probate court of Montgomery County in the State of Alabama, which was at that time the residence of the said Ann C. Sims; and thereupon the said Gazaway B. Lamar accounted with and paid over to the said Benjamin H. Micou, guardian, all the estate with which he was chargeable as guardian of said Ann C. Sims, and received from the said Micou, as guardian, a full release therefor, and that the said Ann C. Sims ratified and confirmed the same when she became of age.

Wherefore defendant demands that the said complaint be dismissed with costs and disbursements of this suit.

DICKERSON & BEAMAN,
Defendant's Solicitors.

UNITED STATES OF AMERICA,
Southern District of New York, ss.:

G. De R. Lamar, being duly sworn, deposes and says that he is the defendant above-named; that he has read the same and knows the contents thereof, and that the said answer is true of his own knowledge, except as to the matters stated on information and belief; and as to those matters he believes it to be true.

G. DE R. LAMAR.

Sworn to before me this 7th day of December, 1875,

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

10 To the judge of the circuit court of the United States for the southern district of New York.

The replication of Ann C. Sims, complainant, to the answer of G. De Rosset Lamar, as executor, &c., of Gazaway B. Lamar, deceased.

This repliant, saving and reserving to herself, now and at all times heretafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that she will aver, maintain, and prove her bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be unto replied and not herein and hereby well and sufficiently unto replied, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays, as in and by her said bill of complaint, she has already prayed.

NASH & HOLT,
Solicitors for Complainant.

GENTS,—Take notice that a replication, of which within is a copy, was this day duly filed in the office of the clerk of this court.

Dated Jan. 4, 1876.

Yours, &c.,

NASH & HOLT,
Complainant's Solicitors.

To DICKERSON & BEAMAN, Esqs.,
Defendant's Attorneys.

11 U. S. circuit court southern district of New York.

ANN C. SIMS, PLAINTIFF
vs.
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased, defendant.

Testimony taken on the part of the plaintiff under the 67th rule of practice for the courts of equity of the United States, by Henry W. Clark, examiner in equity.

THURSDAY, *February 3d*, 1876.

Present, Nash & Holt, esqrs., counsel for plaintiff; E. N. Dickerson, esq., counsel for defendant.

Plaintiff's counsel offers in evidence petition of M. C. Abercrombie, for the appointment of guardian for Ann C. Sims; verified December 11th, 1855, marked Plaintiff's Exhibit No. 1; H. W. C., Feb. 3, 1876.

To the county judge and surrogate of the county of Richmond:

The petition of Margaret C. Abercrombie, of the county of Richmond, respectfully showeth:

That your petitioner is the mother of Martha M. Sims and Ann
12 C. Sims, minors. That said minors are residents of the county of Richmond, and are under fourteen years of age. That said Martha M. was six years of age on the 8th day of September last past, and the said Ann C. was four years of age on the first day of June last

past. That the only relative of the said minors residing in the county of Richmond, is your petitioner. That said minors are entitled to personal property to the value of about five thousand dollars cash, as your petitioner is informed and verily believes, and that to protect and preserve the legal rights of said minors it is necessary that some proper person should be duly appointed the guardian of their persons and estates.

Your petitioner therefore prays that you will appoint Gazaway B. Lamar, of the city of Brooklyn, the guardian of the persons and estates of said minors until they respectively arrive at fourteen years of age, and until another guardian shall be appointed.

And your petitioner will ever pray.

M. C. ABERCROMBIE.

COUNTY OF RICHMOND, *ss.:*

Margaret C. Abercrombie, the above petitioner, being duly sworn, deposes and says, that the matters set forth in the foregoing petition are true, as she is informed and verily believes.

M. C. ABERCROMBIE.

Sworn this 11th day of December, 1855, before me.

County judge.

I, Gazaway B. Lamar, do hereby consent to become the guardian of the above-mentioned minor, pursuant to the prayer of the foregoing petition.

G. B. LAMAR.

Pl'ff's Ex. No. 1, H. W. C., Feb'y 3d, 1876.

13 Also, bond to Ann C. Sims, by her guardian, dated December 11th, 1855, marked Plaintiff's Exhibit No. 2, H. W. C., Feb'y. 3d, 1876.

Know all men by these presents, that we, Gazaway B. Lamar, of the city of Brooklyn, and George G. Sampson and George L. Sampson, as sureties, of the same place, are held and firmly bound unto Ann C. Sims, a minor, under the age of fourteen years, in the sum of ten thousand dollars, lawful money of the United States, to be paid to the said minor, her executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the eleventh day of December, one thousand eight hundred and fifty-five.

The condition of this obligation is such that, if the above bounden Gazaway B. Lamar shall and will faithfully, in all things, discharge the duty of a guardian to the said minor according to law, and render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship, in all respects, to any court having cognizance thereof, when thereunto required, then this obligation to be void; else to remain in full force and virtue.

G. B. LAMAR. [L. S.]
GEO. G. SAMPSON. [L. S.]
GEO. L. SAMPSON. [L. S.]

Sealed and delivered in the presence of—
H. B. METCALFE, as to G. B. Lamar, and Geo. G. Sampson.
FRANK JERKS, as to G. L. Sampson.

Pl'ff's. Ex. No. 2, H. W. C., Feb'y 3d, 1876.

CITY OF BROOKLYN, *Kings County, ss.*:

George L. Sampson, being duly sworn, says that he is a freeholder residing in the city of Brooklyn, and is worth the sum of twenty-
14 thousand dollars over and above all his debts, liabilities, and responsibilities, and property exempt from execution.

GEO. L. SAMPSON.

Sworn this 13th day of December, 1855, before me.

FRANK JENKS,
Commissioner of Deeds.

Filed and approved Dec. 21 st, 1855.

H. B. METCALFE,
County Judge and Surrogate.

RICHMOND COUNTY, *ss:*

George G. Sampson, being duly sworn, says that he is a freeholder, residing in the city of Brooklyn, and is worth the sum of twenty thousand dollars over and above all his debts, liabilities, and responsibilities, and property exempt from execution.

GEO. G. SAMPSON.

Sworn this 11th day of December, A. D. 1855, before me.

H. B. METCALFE,
County Judge.

Also letters of guardianship to Gazaway B. Lamar, for Ann C. Sims, dated December 21st, 1855, marked Plaintiff's Exhibit No. 3, H. W. C., February 3, 1876.

The people of the State of New York to Gazaway B. Lamar, of the city of Brooklyn, send greeting:

Whereas, an application, in due form of law, has been made to our county judge and surrogate of the county of Richmond, to have said Gazaway B. Lamar, appointed the guardian of the person and estate of Ann C. Sims, a minor, under the age of fourteen years.

15 And whereas said Gazaway B. Lamar has agreed and consented to become such guardian, and has duly executed and delivered a bond, pursuant to law, for the faithful discharge of his duty as such guardian, and we, being satisfied of the sufficiency of said bond and that said Gazaway B. Lamar is a good and reputable person, and is in every respect competent to have the person and estate of said minor, do by these presents allow, constitute, and appoint you, the said Gazaway B. Lamar, the general guardian of the person and estate of said minor until she shall arrive at the age of fourteen years, and until another guardian shall be appointed; hereby requiring you, the said guardian, to safely keep the real and personal estate of said minor, which shall hereafter come to your custody, and not suffer any waste, sale or destruction of the same, but to keep up and sustain her lands, tenements, and hereditaments by and with the rents, issues, and profits thereof, or with such other moneys belonging to her as shall come to your possession, and to deliver the same to her when she becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you receive the same; and also to render a just and true account of all moneys and property secured by you, and the ap-

plication thereof, and of your guardianship in all respects, to any court having cognizance thereof, when thereunto required.

In testimony whereof, we have caused the seal of the said surrogate's court of said county of Richmond, to be hereunto affixed.

Witness Henry B. Metcalfe, county judge and surrogate of said county, at the county of Richmond, the twenty-first day of December, in the year of our Lord one thousand eight hundred and fifty-five.

H. B. METCALFE.

[L. S.] *County Judge and Surrogate.*

Pl'ff's Ex. No. 3, H. W. C., Feb'y 3d, 1876.

Also certificate of the clerk of the surrogate's court of Richmond County, N. Y., as to the preceding papers marked Plaintiff's Exhibit No. 4, H. W. C., February 3, 1876.

16 STATE OF NEW YORK,
County of Richmond, ss:

SURROGATE'S OFFICE, *Jan'y 24th*, 1876.

I do hereby certify that I have compared the annexed copies of letters of guardianship to Gazaway B. Lamar, appointing him guardian for Martha M. Sims and Ann C. Sims. Also petition and bond in the matter of guardianship of Martha M. Sims and Ann C. Sims, and of the indorsements thereupon, with the originals now remaining on file in this office, and that the same are correct transcripts therefrom, and of the whole of said originals.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 26th day of January, in the year of our Lord one thousand eight hundred and seventy-six.

[L. S.] WILLIAM D. PUTNAM.
Clerk of the Surrogate's Court.

Pl'ff's Ex. No. 4, H. W. C., Feb'y 3d, 1876.

Also certificate of the surrogate of the county of New York, that letters testamentary were granted on the estate of Gazaway B. Lamar to G. De Rosset Lamar, marked Plaintiff's Exhibit No. 5, H. W. C., February 3d, 1876.

The people of the State of New York to all whom these presents shall come or may concern, send greeting:

Know ye that we, having inspected the records of our surrogate's court in and for the county of New York, do find that, on the 10th day of November, in the year one thousand eight hundred and seventy-four, by said court, letters testamentary on the estate of Gazaway B. Lamar, late of the city of New York, deceased, were granted and committed unto G. De Rosset Lamar of said city, an executor named in the
17 last will and testament of said deceased, and that it does not appear by said records that said letters have been revoked.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, S. D. Van Schaick, surrogate our said county, at the city of New York, the twenty-seventh day

of January, in the year of our Lord one thousand eight hundred and seventy-six.

PETER V. BURTSELL,
Clerk to the Surrogate's Court.

Pl'ff's Ex. No. 5, H. W. C., Feb'y 3rd, 1876.

(The examination is hereto adjourned to February 17th at 2 p. m.

THURSDAY, *February 17th*, 1875.

Examination further adjourned to March 2d, at 2, p. m.

I, Henry W. Clark, examiner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, do hereby certify that, on the third day of February, A. D. 1876, I was attended at my office, number 58 Pine street, in the city of New York, by the counsel for the respective parties in the above entitled cause, and that Exhibits Nos. 1, 2, 3, 4 and 5, were on that day introduced in evidence in said cause.

Dated New York, March 23d, A. D. 1876.

HENRY W. CLARK,
Examiner.

18 U. S. circuit court, southern district of New York. In equity.

ANN C. SIMS
vs.
G. DE ROSSET LAMAR, EX'C'R, ETC.

ANN C. SIMS, ADM'X,
vs.
G. DE ROSSET LAMAR, EX'C'R, ETC.

In the above-entitled cases it is admitted that the defendant could prove the statement of fact hereto annexed; and it is agreed that such statement of fact shall be considered as proven by the defendant in these cases, and that the same may be used on the final hearing of each of these cases as if it had been duly proven by competent witnesses; it being agreed, however, that the complainant can at the time of hearing make any and all objections to the admissibility of any part of such statement of facts that he could have made on the offer to prove any such fact by any competent witness, and with the like effect
19 as though evidence of each and every fact therein contained had been duly objected to by complainant, and the same taken under exception.

NASH & HOLT,
Solicitors for Ann C. Sims.
DICKERSON & BEAMAN,
Solicitors for Lamar.

Statement of fact.

Ann C. Sims, the plaintiff in each of the above-entitled suits, and her sister Martha M. Sims, now deceased, were the children of a nephew of Mr. Gazaway B. Lamar, deceased, whose executor is the defendant in these cases.

Martha M. Sims, now deceased, was born at Augusta, Ga., on Sept. 8th, in the year 1849. Ann C. Sims was born at Apalachicola, Fla., on June 1st, in the year 1851. William W. Sims, their father, the nephew of Gazaway B. Lamar, died at Savannah, Ga., on Nov. 23d, in the year 1850, leaving their mother, Margaret M. Sims, still living.

In 1853 Mrs. Margaret Sims married the Rev. R. M. Abercrombie, of Clifton, Staten Island, N. Y.

Gazaway B. Lamar was duly appointed, in the State of New York, the guardian of Martha M. Sims and Ann C. Sims, on December 11th, 1855.

After the marriage of their mother, Mrs. Sims, in 1853, to Mr. Abercrombie, Martha M. and Ann C. Sims lived with Mr. and Mrs. Abercrombie at Clifton, Staten Island, Richmond Co., N. Y., until 1856, several months after letters of guardianship were issued to Mr. G. B. Lamar in 1855, and thereafter at Hartford, Ct., until the death of their mother, Mrs. Abercrombie, in the spring of 1859, Mr. Lamar, as guardian, meanwhile paying Mr. Abercrombie for their board.

In the spring of 1859, after the death of Mrs. Abercrombie
20 Martha M. and Ann C. Sims removed to Augusta, Ga., and there lived with their grandmother, Mrs. Ann Sims, and her daughter, an only living child, their father's sister, Miss Mary Jane Sims, Mr. Lamar, as guardian, continuing to pay their board. Since 1855 neither the said Martha M. nor the said Ann C. Sims have ever resided in the State of New York.

On May 3d, 1859, Mr. Lamar, then at New York, wrote to Mrs. Sims, then at Augusta, Georgia, a letter which was received by her, which letter is as follows:

NEW YORK, *May* 23, 1859.

Mrs. ANN SIMS, *Augusta:*

DEAR MADAM: You were informed through Mary Jane that Rev. Mr. Abercrombie had offered to surrender the property he acquired through Mrs. Sims, and which had belonged to her former husband, to the two children. Subsequently he made a transfer, to take effect at his death, and two notes, one to each of the girls, payable six months after his death, for $2,750 each. Again he changed his mind, and offered to make a surrender at once, and gave me deeds to two three-story houses in Brooklyn, E. D., seventeen feet only, and subject to $4,500 mortgage on each, with last year's taxes and some arrears for repairs, and only one house tenanted, at $550 rent.

After inspecting the houses, and taking the opinion of a judicious friend, which confirmed my own, I thought it best to decline the proposition in that shape, and hold on to the notes, $2,750 each, though unsecured, because the encumbrances on the property might entail more outlay than income for the children. This morning I have a letter from him without any further proposition, which I hoped he would have made. So that I retain the two notes and a transfer of all his interest derived through his wife to the balance of the estate. This will include her one-third part of the ten shares Mechanics' Bank stock, and nine shares of the Bank of Commerce, and her third of the notes received for the Florida land. I hope the children are in improving health, and that you and Mary Jane will charge yourselves with
21 the direction of their education, as well as the supervision of them in other respects, and look to me for the necessary expenses to be incurred. Their income is limited, without the notes of Rev. Mr.

A. and those for the lands, to between $500 and $600 each, so long as the banks continue to pay regular dividends, as they have done.

Please remember me to all friends.

Yours, etc.,

G. B. LAMAR.

On or about the 18th day of January, 1860, the said Mary Jane Sims, aunt of the said Martha M. and Ann C. Sims, was married to Benjamin H. Micou, of Montgomery, Ala., and thereafter the said Martha M. and Ann C. Sims and their grandmother resided with Mr. and Mrs. Benjamin H. Micou, at Montgomery, Ala.

The said Martha M. Sims died on or about November 2d, 1864, unmarried, and without leaving a will, and leaving her sister, the said Ann C. Sims, her next of kin.

The said Ann C. Sims has continued to reside at Montgomery, Ala., in the family of the said Benjamin H. Micou, from that time until the present, excepting a temporary absence in Europe, while travelling in 1866 and 1867 with her aunt, the said Mrs. Micou, and her grandmother, the said Mrs. Ann Sims.

The said Gazaway B. Lamar, during the years 1855 to 1859, resided partly in Georgia and partly in New York, and in the spring of 1861 had a temporary residence with his family at the city of New York. He resided at Brooklyn, New York, at the time the letters of guardianship were issued in December, 1855.

After the breaking out of the war of the rebellion against the United States, in the spring of 1861, Mr. Lamar sympathized with the rebellion, and desired its success; and on account of his alleged disloyalty, the house where he resided in New York City was mobbed in April, 1861.

Mr. Lamar, immediately after the death of his wife at New York on the 4th of May, 1861, escaped from New York and passed through
22 the lines to Savannah, Ga., where he resided during all the rebellion, and until 1872 or 1873, sympathizing with the rebellion against the United States, and doing whatever he could to accomplish its success.

Soon after General Sherman with his army captured Savannah, in December, 1864, Mr. Lamar took the oath of allegience to the United States.

Afterwards, in January, 1865, Mr. Lamar was arrested by the United States authorities at Savannah, Ga., and brought to the Old Capitol Prison, Washington, where he was confined as a prisoner of the United States until August, 1865.

The said Mrs. Mary Jane Micou, and the said Mr. B. H. Micou, and Mrs. Ann Sims, who lived with Mr. and Mrs. Micou, and each and all of them, sympathized with the said rebellion against the United States, and desired its success; and each and all of them, and the said Lamar, failed during the said rebellion to bear true allegiance to the United States. Miss Martha M. and Ann C. Sims resided with Mr. and Mrs. Micou through the war.

On Nov. 27th, 1861, Mr. Lamar wrote letters to New York, and sent them to Benj. Huger, military commandment at Norfolk, Va.

On December 1st, 1861, after the receipt of this letter, Gen. Huger wrote to Mr. Lamar as follows:

NORFOLK, *December* 1, 1861.

G. B. LAMAR, Esq., *Savannah, Ga.:*

DEAR SIR: I received by last night's mail your note of 27th, and

letter for Mrs. Colonel Fowle, covering a draft for £200, which I will forward to her, and assure her my protection and assistance if she can get here. Mr. Seward allows no one to pass without his permission, and no one has come this way for some two weeks past. I will write to her, and give her such information as I can. The four letters sent by you (one for Montreal and three to New York) I thought it most prudent not to send. I fear they would be forwarded to Mr. Seward, and the gentlemen sent to Fort Lafayette, and all the property
23 alluded to confiscated. I will retain these letters here till I hear further from you.

Very respectfully yours,

BENJAMIN HUGER.

On December 4th, 1861, after the receipt of the letter just quoted, Mr. Lamar wrote to Mr. J. T. Soutter, then president of the Bank of the Republic, of New York, and a personal friend of Mr. Lamar, as follows:

SAVANNAH, *Dec.* 4, 1861.

J. T. SOUTTER, Esq., (care R. H. Lowry, Esq.,) *New York:*

DEAR SIR: I think no attempt will now be made to sequestrate your interests in the Confederacy.

Should it prove otherwise, I will employ Messrs. Lloyd & Owens in your behalf. But I am on very good terms with the commissioner, and district attorney is Judge Nicoll, and I do not believe that either of them think yours is liable. But you may rest assured that if they do I can prove enough to discharge it.

I want all Mrs. Henderson's, Mrs. McLeod's, and the Misses Sims's stock in the Bank Republic sold and invested in city stocks of the South, or guaranteed stocks of cities or railroad companies, as you may deem to be best—leaving all to you. I will send the power of attorney and scrip by this conveyance, if I can; if not, by the first opportunity. When the bonds are bought, be so good as to send them and place them on special deposit in the Bank of the People, Montreal, Canada.

If Mr. Soutter is not accessible to attend to this request, Mr. Lowry will please do it without delay, and send my box of silver to the same depository also.

If Messrs. Guion & Co. have not placed the money due me to the credit of the Bank of Commerce, Savannah, in the London Joint Stock Bank, I wish Messrs. Williams & Guion to pay the Bank Republic amount of my overdraft, some $1,200 to $1,300—pay expenses for Charlotte and Anna to come South, and to order the balance to
24 be credited as above, be it what it may, and to send me account sales and account current.

If Mr. Soutter holds the guano in Brooklyn, let that be for his security for my debt to him, and he will not lose by it. But if not, then let the guano be conveyed to the Guano Company and to W. H. Webb, jointly to pay on account of what I owe to them—ratably—and let the transfer be made at once, for I know it will be plundered. There should be 800 tons of it, and the Guano Company guarantees that quantity.

This letter is intended as well for Mr. Lowry, Messrs. Williams & Guion, as for Mr. Soutter's instructions.

The cotton crop will not exceed 3½ if all be saved, and probably not

over 3 millions be saved, if so much, as there is great hindrance everywhere, especially on the Atlantic coast.

Prices in the interior, 6 to 7½.

Yours,

G. B. LAMAR.

WASHINGTON, D. C., *Nov.* 22, 1876.

True copy:

JOHN E. BEALL.

The letter just quoted was received by Mr. Lowry, and in February, 1862, acting under the directions of Mr. Lamar in said letter, he sold the Misses Sims's stock in the Bank of the Republic, and the other shares of stock mentioned in said letter, and invested in such bonds or guaranteed stocks as he deemed best, and afterward placed said bonds on special deposit in the Bank of the People, Montreal, Canada, and transmitted an account of such sale and purchase to Mr. Lamar, the same being dated Feb. 8th, 1862, which account of sale was not received by Mr. Lamar till July 22d, 1863. Said account of sale is as follows:

Sales of 235 shares bank stock for account of sundries, per order of trustee.

1862.									
Jan.	28,	Mrs. Henderson,	20	shares at	79,	less ⅛	.....	$1,577	50
	30,	"	20	"	" 80,	"	.....	1,597	50
	31	"	10	"	" 80,	"	.....	798	75
25	Feb.	5, Mrs. Henderson,	30	shares at	79,	less ⅛	.....	$2,366	25
		5, "	5	"	" 79,	"	.....	394	38
		5, Mrs. McLeod,	67	"	" 79,	"	.....	5,284	62
		8, Mrs. Henderson,	32,	"	" 79,	"	.....	2,524	00
		8, Sims' children,	51,	"	" 79,	"	.....	4,022	63
								$18,565	63

INVESTED IN—

$5,000	Memphis, endorsed, at	42¾	.....	$2,137	50		
5,000	" " "	57⅛	.....	1,713	75		
4,000	" " "	55¼	.....	2,210	00		
1,000	E. T. & Ga. "	57⅛	.....	571	25		
10,000	New Orleans, "	65¼	.....	6,525	00		
1,000	E. T. & Va. "	55¼	.....	552	50		
6,000	Mobile "	68¼	.....	4,095	00		
1,000	Memphis, "	55	.....	550	00	18,355	00
	Cash balance					$210	63

DIVIDENDS COLLECTED.

Bank, 4 per cent., $23,500	$940 00	
New Orleans coupons to 1863	900 00	1,740 00
Cash credit trustee		$2,050 63

This account sale is endorsed as follows: "R. H. Lowry's account sales; 235 shares Bank Republic, February 8th, 1862, with investments received July 22d, 1863."

When Mr. Lamar left New York for Georgia in May, 1861, he had already removed all his property from New York except certain trust property, including that which he held as guardian of Miss Martha M. and Miss Ann C. Sims.

Mr. Lamar from time to time invested the property of Martha M. and Ann C. Sims, that was within the Confederate States, in whatever seemed to him to be most secure and safe—some in Confederate State bonds; some in the bonds of the individual States which composed the Confederacy; some in bonds of cities within the Confederate States, some in bonds of railroads within the Confederate States; and some in stock of banks within the Confederate States.

Mr. Lamar invested portions of his own money in investments similar in character to the investments he made with the money of the Misses Sims.

26 On July 9th, 1862, Mr. Lamar, then at Savannah, Georgia, wrote Mr. Micou, then at Montgomery, Alabama, as follows:

SAVANNAH, *July* 9, 1862.

BENJAMIN H. MICOU, Esq., *Montgomery, Ala.:*

DEAR SIR: I have about $5,000 to $7,000 of money belonging to the Misses Sims in my hands, and I cannot longer in justice to myself allow them interest on it.

Would you advise its being put in C. S. treasury notes bearing 7 $\frac{30}{100}$ interest, or in S. C. eight per cent. bonds, or what other disposition can I make of it, which will be safe and profitable for them? Please advise me.

Yours, etc.,

G. B. LAMAR.

On July 11th, 1862, Mr. Micou wrote to Mr. Lamar a letter in reply to the letter last quoted, which letter of Mr. Micou was received by Mr. Lamar, but cannot be found among the papers of Mr. Lamar.

On July 15th, 1862, Mr. Lamar having received Mr. Micou's letter of July 11th, just referred to, wrote him in reply thereto as follows:

SAVANNAH, *July* 15, 1862.

BENJAMIN H. MICOU, Esq.:

DEAR SIR: I have yours 11th inst. I think Alabama eight per cent. stock, if to be had at par, the best investment, as C. S. fifteen million can not be had without a premium.

Will you get seven thousand dollars of it for the Misses Sims, and draw on me at sight for the amount? If you can get one hundred thousand or any other sum of the same at par, please do so, and draw on me at sight for the amount.

Please retain the bonds and send me a receipt for them in the name as guardian for the girls. If you get more please send them by express to me here and draw as above.

I am, etc.,

G. B. LAMAR.

On or about July 21st, 1862, Mr. Micou having received the letter of Mr. Lamar just quoted, bought for the Misses Sims one 5,000
27 Alabama 8 per cent. and one 2,000 C. S. *States* (15 million loan), and wrote to Mr. Lamar a letter of that day's date, which letter cannot be found among the papers of Mr. Lamar, but this letter con-

tained a draft on Mr. Lamar to pay for the cost of said bonds, of which draft the following is a copy:

$7,235.80.] MONTGOMERY, ALA., *July* 21, 1862.

Pay to the order of Eben Kirk, cash., seventy-two hundred and thirty-five $\frac{80}{100}$ dollars, value received, and charge the same to account of—

BENJ. H. MICOU.

To G. B. LAMAR, Esq.,
Savannah, Ga.

Paid, 24 July, 1862.

(Endorsed on back of draft:) B. H. Micou. Draft. July 21, 1862.

Pay Jno. C. Ferrill, esq., cash., or order.

EBEN KIRK, *Cashier.*

Received payment.

JNO. C. FERRILL, *Cash.*

On July 24th, 1862, Mr. Lamar, after the receipt of Mr. Micou's letter of July 21st, and the draft just quoted, wrote to Mr. Micou as follows:

SAVANNAH, *July* 24, 1862.

B. H. MICOU, Esq.:

DEAR SIR: Yours 21st is received, and I have paid your draft for $7,235.85 for 5,000 Alabama eight per cent. bonds, 2,000 C. S. A. fifteen million eight per cent. bonds, with accrued interest. I think the money well invested.

Please send me a receipt for the bonds, expressing the numbers, date, and amount, and when the interest is payable, either in your own name or of Mrs. Sims or Mrs. Micou. I want a voucher for the money, and let the receipt express in my name as guardian for the two girls.

I am afraid their Bank of the Republic stock will be confiscated. I wrote last fall to have it sold, but have heard nothing from it.

Kinds regards to all.

Yours, etc.,

G. B. LAMAR.

28 Mr. Lamar paid the draft above quoted by a check, of which the following is a copy:

No. 30.] SAVANNAH, *July* 24, 1862.

BANK OF COMMERCE:

Pay to B. H. Micou, d'ft, or bearer, seventy-two hundred thirty-five $\frac{80}{100}$ dollars.

$7,235.80.] G. B. LAMAR.

Mr. Lamar duly charged the money paid on the above check to the account of the Misses Martha M. and Ann C. Sims, as appears from the following entry from his books of account:

SAVANNAH, *September*, 1862.

Miss M. M. Sims paid her half of $5,000 Alabama 8 per cent. bond and 2,000 C. S. States (15 million loan), which are held at present in Alabama by Mrs. A. Sims $3,617 90

Miss A. C. Sims paid for her half of the same 3,617 90

On February 18th, 1863, Mr. Micou wrote Mr. Lamar a letter, having some reference to the investments made by Mr. Lamar for the Misses Sims in Alabama State bonds, which letter was received by Mr. Lamar, but cannot be found among his papers.

On February 23d, 1863, after the receipt of the letter just referred to, Mr. Lamar wrote to Mr. Micou as follows:

SAVANNAH, *February* 23, 1863.

B. H. MICOU, Esq., *Tallassee, Ala.:*

DEAR SIR: I am in receipt yours 18th inst. I think I would advise you to sell the Alabama bonds and reinvest in the fifteen million loan, if at less than ten per cent. difference between that and the ten million, as coupons of the former are received in payment of exports on cotton, and I hope you will do so promptly.

I am, etc.,

G. B. LAMAR.

On or about March 12th, 1863, Mr. Micou, after the receipt of the letter just quoted, sold the Alabama bonds of the Misses Sims, and bought on their account 7 Confederate States 15-million loan bonds for $1,000 each, and wrote to Mr. Lamar giving the particulars of
29 said sale and purchase, which letter was received by Mr. Lamar, but cannot be found among his papers,

On March 24th, 1863, Mr. Lamar, after the receipt of the letter just referred to, wrote Mr. Micou as follows:

SAVANNAH, *March* 24, 1863.

B. H. MICOU, Esq., *Tallassee, Ala.:*

DEAR SIR: I am in receipt of yours 12th, with statement of sale and purchase of eight per cent. C. S. fifteen-million loan for account of the Misses Sims, showing a balance due you $420, for which I enclose a check on the bank in Montgomery (the Montgomery Insurance Co.) and Mrs. Ann Sims's receipt for the bonds.

The coupons of these fifteen million loan are received in payment for export duty on cotton, and are worth nearly as much as silver or gold, being bought for that purpose by shippers, of which please avail in disposing of them. I think the exchange a very good one, and am obliged for your agency in effecting it.

(No signature.)

In regard to the sale and purchase referred to in the two letters just quoted, Mr. Lamar made the following entry in his books of account:

SAVANNAH, *March*, 1863.

B. H. Micou, to sundries.

To Miss M. M. Sims, for her half of 5 Alabama bonds sold, with interest due by him at 33 per cent. premium, per his letter, 12 March, '63	$3,605 00
To Miss A. C. Sims for her half of the same, all held by Mrs. Ann Sims	3,605 00
	$7,210 00

Sundries to B. H. Micou.

Miss M. M. Sims, for one-half of 7 C. States 15-million loan bought by him, $1,000 each, Nos. 316, 317, 318, 319, 320, 321, and 322, deposited with Mrs. Ann Sims for her account, per his letter, 12th March, 1863, and her receipt of same date	$3,815 00
Miss A. C. Sims for one-half of the same bond	3,815 00
	$7,630 00

30 The bonds so purchased were personally receipted for by the said Mrs. Ann Sims, the grandmother of the said Misses Sims, who held them for their account.

After the close of the rebellion many of the investments made by Mr. Lamar, as guardian, including those bonds just above referred to, became of little or no value in consequence of the successful efforts of the United States in putting down the rebellion.

On October 27th, 1865, after the release of Mr. Lamar from the Old Capitol prison, the said Mrs. Mary Jane Micou wrote to Mr. Lamar from Augusta a letter as follows:

AUGUSTA, *Oct.* 27, 1865.

MY DEAR UNCLE: It was with feelings of sincere thankfulness (not to the "powers that be," but to a merciful Providence) that I heard of your release from bondage and restoration to your home and family. Deep and heavy have been your afflictions, but I trust you have been enabled to meet them with a Christian's faith, and that God has been your shield and comfort in the midst of trouble. I should have written before to dear Caro and yourself, to tell you how much sorrow we felt, and how much sympathy for your great and severe trial, but our home was out of the principal routes, and communication was cut off for months. What must have been the shock to you when to us it was so great! We are in Augusta, but expect, Providence permitting, to leave in a week or ten days for Europe. We think of remaining a week or two in England until matters settle a little in this forlorn country. Mother has lost everything by our country's subjugation, and is very anxious to hear from you in reference to Nannie's property. I sincerely trust something may be saved for the dear child. Will you be so kind as to write us plainly in reference to her affairs? We had hoped to have passed through Savannah in order to see Caro and yourself, but mother is so much of an invalid, and my babe so delicate, that we are obliged to select the route which offers the most advantages for them, and that seems to be the one through Louisville and Nashville by railroad to New York.

31 Please give a great deal of love to Caro and family, and to Annie. Mother and Nannie join with me in affectionate regards to them and to yourself. Address me at Planters' Hotel, Augusta, and thus oblige,

Your affectionate niece,

MARY J. C. MICOU.

On December 3d, 1865, the said Mrs. Mary Jane Micou wrote to Mr. Lamar again as follows from New York City:

NEW YORK, *Dec.* 3, 1865.

MY DEAR UNCLE: I wrote you from Augusta asking some information in reference to Nannie's prospects, as we did not know whether she had lost much or everything by the war or no. I suppose you did not get my letter in time to write me there. We shall be detained here for some weeks, as my mother and babe are under Dr. Bayard's care. Will you be so kind as to let me hear from you, directing to care Hill & Chapman, 55 Pine street? I understand that Charlotte and little Hattie are still in Europe. I hope we will come across them while there, as it would afford me great pleasure to see them. We are anxiously waiting to sail, as New York is any thing but agreeable to any of us. Mr. Micou sends his best respects, and mother and Nannie unite in sending much love to you with

Your much attached niece,

MARY J. C. MICOU.

Love to Annie.

On November 8th, 1866, the said Benjamin H. Micou wrote to Mr. Lamar as follows from Montgomery, Ala.:

MONTGOMERY, *Nov.* 8, 1866.

G. B. LAMAR, Esq.:

DEAR SIR: I direct my nephew, Major E. F. Morgan, to hand you this, and to inquire for me after your health.

Mrs. Sims is with my family in England. She has been a long time in bad health. She is in much better health now, but the disease with which she has been so long troubled still clings to her, and seems
32 almost incurable. She is quite despondent, particularly about money affairs, her investments having almost all proved worthless, and as much so on account of her grand-daughter, Nannie Sims, as her own.

A letter from you to her or Mary would be very cheerfully received. We have all sympathized with you most sincerely in your troubles and imprisonment. Mrs. Sims feels so entirely dependent that I think it would benefit her health greatly if she could feel that she had something of her own to depend on for a support of herself and Nannie.

I would make them a deed of gift of $5,000, but she would be much more contented if it could come to her in some other shape. Supposing there is very little available property in your hands belonging to Nannie Sims, I ask you to join me in an innocent fraud to accomplish the object in view, namely:

I am just about to increase our manufacturing business, and will send you by mail to Savannah, in a few days, a pamphlet or prospectus, which you will understand when you see it. And I ask you to write me to subscribe, as agent for Miss Ann Sims, for $5,000 of the stock, and to write her that you have done so, and given her the stock for benefit of her and Nannie, as if it was their property in your hands.

I think the stock will be profitable, and I will pay for it and place it in Mrs. Sims' name. Please answer when you receive the pamphlet, which will be sent you in a very few days, as soon as it comes from the printer. Mrs. Sims' address is Sandonne Villa, Radford Road, Leamington, Warwickshire, England.

My family will remain in England until next fall.

Yours, very truly,

BENJ. H. MICOU.

On Dec. 26th, 1866, Mr. Lamar wrote to Mr. Micou a letter, which was received by Mr. Micou, and enclosed by him to Miss Ann C. Sims, which letter was as follows:

33 SAVANNAH, *Dec.* 26, 1866.

B. H. MICOU, Esq.,

DEAR SIR: Yours 8th November last came to my hands on my return from Washington on Saturday, and I very much regret I was not at home to have complied with your wishes.

I regret, too, Mrs. Sims's continued affliction, and trust some remedy may yet be found to remove the cause of it.

After much trouble and delay, I succeeded, about six months ago, in getting the half of the Florida lands deeded back to me as guardian for Miss Ann.

On inquiring about the value, I could obtain very little information that was satisfactory, but Mr. Nightingale thinks our tract of 1,800 acres was worth $20 per acre, but I fear that is a double estimate; but I am not sure that it could be more safely and profitably invested if I had the cash for it. My opinion is that all the good lands in the State of Florida will not only maintain present prices, but must advance, for there is no great quantity of it, and the climate there renders some of its products, S. I. cotton and tobacco, very valuable. The fees I paid the lawyer to recover the half of the lands consumed all the funds I had in hand.

I hope you and your family had a pleasant and profitable trip to Europe, and that you may all live long to enjoy what God has blessed you with of this world's goods.

The government officials have plundered me of 4,100 bales of cotton, and every person, almost without exception, who held any of my property, or who was indebted to me, has proven to be dishonest.

The Confederate general burnt 1,390 bales of cotton for me at Montgomery, and I returned from Washington without recovering a cent from the robbers, and I find myself reduced to poverty in my old age, and compelled to live upon what gleanings I may be able to recover from the débris of my property, whilst $200,000 of debts stand up against me, which I hope to be able to pay in full, or nearly so.

34 I am old, and my faculties failing. I am not competent to attend as I have done to business, and cannot expect to do so but for a very few years or months; and if Miss Ann will choose a guardian and get him qualified, I would be glad to convey the lands, the half of which she owns, to a new guardian, and also the bonds for which her Bank of Republic stock was exchanged, and which are good, and will be better.

Please remember me to Mrs. Sims, your good lady, and Miss Ann, with affectionate regard and respect to each.

Very respectfully, your obedient servant,

G. B. LAMAR.

On January 12th, 1867, Mr. Lamar wrote from Savannah, Ga., a letter addressed to Miss Ann C. Sims, or Mrs. Mary Jane Micou, at Leamington, England, as follows:

SAVANNAH, *January* 12, 1867.

Mrs. ANN C. SIMS, or
Mrs. MARY J. MICOU,
Sandonne Villa, Radford Road,
Leamington, Warwickshire, England:

DEAR MADAM: I write to inform you that I have saved from the wreck of the property of my niece, Ann C. Sims, surviving her sister, namely:

Three bonds, Nos. 1096, 1126, and 1488, of the city of Memphis, $1,000 each, endorsed by the State of Tennessee	$3,000
One bond, city of Mobile, No. 631, for	1,000
One of E. T. & Geo. Railroad Co., No. 17	1,000
Coupons past due and uncollected on the Memphis bonds	1,080
On the E. T. & Geo. Railroad	360
On the Mobile bond	400
	*$6,840

35 And half the Wakulla tract of 1,800 acres land in Florida, which had been sold and not paid for, and which has been deeded back to me as guardian. The half in the other tracts remain as before. I have sent the Memphis City and the E. T. and Georgia Railroad coupons to New York, where they are payable, to be protected, that they may bear interest, and I shall send the $400 Mobile coupons to be invested in a new bond which the city is giving in payment, and on all new bonds they will pay the interest regularly hereafter.

The land is valuable, but cannot be sold at present, especially in undivided half, as it is. I think I will take means to have Cheevers' half sold and buy it in, if at a sacrifice, and Ann can afford to pay more for it than any one else. The Confederate State bonds which were taken in Alabama are worth nothing, I presume, unless you took the flight and disposed of them.

If Mr. Micou would undertake the guardianship, I would be glad to transfer it to him, as I am getting old, and it will be more convenient for him to attend to it; but he must get appointed by the court at her request. I hold two notes of Mr. Abercrombie, payable six months after his death.

I am, etc.,

G. B. LAMAR.

The Wakulla tract referred to in the preceding letter was inherited by the Misses Sims from their father, and was not purchased with and does not represent any part of the trust funds which were held by Mr. Lamar as guardian for the Misses Sims.

On the 24th of January, 1867, after the receipt of the letter last quoted, Miss Ann C. Sims wrote from Leamington, England, to the said Mr. Micou a letter, a copy of which is as follows:

LEAMINGTON, WARWICKSHIRE, ENGLAND,
January 24, 1867.

To BENJ. H. MICOU, Esq.,
Montgomery, Alabama, United States of America:

MY DEAR UNCLE: I desire that my present guardian, G. B.
36 Lamar, esq., of Savannah, Georgia, shall transfer my guardian-

* The above bonds and coupons to date were worth in New York City, on February 26, 1877, about $2,648.

ship to you, and that my said guardianship and estate be transferred from Georgia to the State of Alabama.

I hereby request the probate court of Montgomery county and State of Alabama to appoint you my guardian.

I am, affectionately, your niece,

ANN C. SIMS.

Witness to signature:
Mrs. ANN SIMS, grandmother,
Mrs. MARY J. C. SIMS, aunt.

On February 3d, 1867, the said Mrs. Mary Jane Micou, after the receipt of Mr. Lamar's letter just quoted of January 12th, 1867, wrote from Leamington, England, a letter as follows to the said Mr. Lamar:

LEAMINGTON, ENGLAND,
February 3, 1867.

MY DEAR UNCLE: Your very kind letter of January 12th was received to-day, and in the name of mother and mother and myself I thank you very much for the explicit statement of Nannie's affairs, and also for the care and trouble you have had with her property. We are very thankful she has even a little left, for as mother has lost everything, it would indeed be a serious trial that the poor child should be left entirely penniless. Mr. Micou wrote me of your desire to transfer the guardianship, and while satisfied that no one can do better for her than yourself, we still feel that in the complicated condition of your own affairs we have no right to decline relieving you of hers. She has accordingly sent him a written request to become her guardian, which he will have presented to the proper court. I hope, however, before the transfer, that you will succeed in purchasing the other half of the Florida land, if you think it to her interest to do so. I do not count very much upon Mr. Abercrombie's notes.

I had heard of Annie's marriage and sincerely hope it may prove a very happy one. We have made repeated inquiries from American friends of Mrs. Fowle and dear little Hattie, but have obtained
37 no information of their present whereabouts. I still hope to meet them on the continent next summer. Derry, I suppose, is in Augusta.

We have thought very often of you during your persecution and trials, my dear uncle, and our sympathies have followed you through all. I sincerely hope that the decision recently pronounced by the Supreme Court upon the illegality of trials by military commissions will render null and void the ridiculous and unjust sentence under which you are now suffering, and that you will be able after awhile to recover the amount of the cotton stolen from you. I cannot but believe that the party at present in power in Congress are getting out of their depth, and will soon have to succumb to common sense and public opinion. I can but trust that God will overrule their malice, and that there is a future in store for the South yet. She certainly is now passing through much tribulation and deep humiliation.

I quite agree with you in reference to the inducements to remain absent from the country, but unfortunately we cannot afford to do so, unless I leave Mr. Micou to bear all the anxiety and burden of the present state of affairs without the comfort of his home and family, which I do not feel satisfied to do. He is obliged to attend closely to his affairs these trying times, as everything he has is in the country,

and it is as much as any man can do to keep his head above water who is in that situation. Besides, he thinks he lives in the world not for his own pleasure, but to do all he can for those who come within his sphere of influence, and that therefore also his place is at home.

I find too that when a person reaches mother's age they are not contented away from their own country and friends. She has improved very much in health since coming over, and as I have a little boy, 21 months old, who is a great source of interest and amusement to her, she keeps up her spirits very well, but she would not, I think, if it were not our hope to return next autumn. Nannie and the other two girls are studying hard in order to make the most of their time here, but I do not think the English school we have selected at all superior
38 to our own as they were previous to the war, though the advantages for French, etc., are better. She bids fair to make a very small woman, but is bright and full of vivacity; in good health, but with very little physical strength.

I hope dear Caro and her family are quite well. Do give my very best love to her. It would afford me great pleasure to see you all again, and I do hope, my dear uncle, that I shall some day be gratified by seeing you in my own house. Mother and Nannie unite with me in much love to yourself, Mrs. McLeod, and Annie, and I am always

Your truly attached niece,

MARY J. C. MICOU.

On the 19th of February, 1867, the said Benjamin H. Micou wrote to the said Lamar from Montgomery, Ala., a letter, a copy of which is as follows:

MONTGOMERY, ALA., *February* 19, 1867.

G. B. LAMAR, *Savannah, Ga.:*

MY DEAR SIR: On receipt of your letter indicating your wish to be relieved of the guardianship of Ann C. Sims, I enclosed your letter and offered to Mrs. Sims and Nannie to become her guardian if requested to do so. By last mail I received a letter, of which I send you a copy, from Ann C. Sims.

My lawyers here tell me a legislature enactment is not necessary to enable me to receive the trust; that I have simply to apply with this letter to the judge of probate of Montgomery County to grant me letters of guardianship, and, in due course, I will be appointed, on giving the necessary bond and security.

The amount of said bond it would be more proper for you to fix.

I will make the proper application in a day or two. I am at present confined to my house and have been several weeks, having had the misfortune to have my leg broken on the railroad eighteen days ago. My hurt is improving fast, and I have gotten so far along as to be able to go about my house on crutches and to sit up, and have ridden out several times; my health otherwise is excellent.

39 Hoping to hear from you on this subject at your earliest convenience, I remain,

Yours, respectfully,

BENJ. H. MICOU.

My family were quite well on 24th January, last date.

On February 22d, 1867, Mr Lamar, after the receipt of the letter just quoted, wrote Mr. Micou as follows:

SAVANNAH, *February* 22, 1867.

B. H. MICOU, Esq.:

MY DEAR SIR: I received this morning yours of the 19th January, postmarked February 20th (and I presume you made a slip of a month when dating it), with the copy of Mrs. Sims's letter of 24th January, at Lemington, England.

As soon as you obtain the letters of guardianship for Miss Sims I will be prepared to surrender my trust, with the property belonging to her, according to law.

I very much regret to hear of your fracture of the leg, but am glad it was no worse, and that you are recovering so well.

I obtained last year the deeds for two estates in Florida, conveying the undivided half of 1,800 acres of land in Florida back to me, as guardian for Miss A. Sims. The other half is owned by W. W. Cheevers' estate, and the whole is said to be one of the most valuable in Florida, and worth $20 per acre; some say more.

The difficulty will be in selling the undivided half, and the trouble that George H. Cheevers, the administrator, may be disposed to interpose from his malignity towards me.

There are plenty of debts by the estate in this State, which are many of them in judgment, as well as others; and I have about $700 or $800 in cash due to her, with which some of the judgment claims might be bought up, and a judgment taken on them, at the first term of the court in Florida, which would be the oldest judgment in that State, under which his half of the land might be sold, and be bought in at a low figure, and she then be made proprietress of the whole, and a sale could then be made at any time, without consulting Mr. Geo. H. Cheever, administrator, or any one else.

It has been my purpose to do this, but my time has been so occupied by the United States officers and my own affairs that I could not attend properly to the details.

I will write to a lawyer to-day to ascertain if there are any existing judgments, or other liens, on his half of the land; if not, and you agree, I will proceed to get a judgment, and I or you can carry out the plan accordingly.

The State of Florida, where there is any tolerably good land, is the most prosperous of any I know; population is pouring into it, and, besides sugar, cotton, tobacco, etc., these lands have white oak, growth of great size and value for staves.

Hoping you will soon be on your legs again, and active as ever, I remain,

Yours, truly,

G. B. LAMAR.

After the receipt of the letter just quoted, and on the 15th of March, 1867, the said Benjamin H. Micou was appointed the guardian of the said Miss Ann C. Sims by the court of probate of Montgomery County, Alabama, as will more fully appear by a duly-certified copy of the said proceedings hereafter printed, marked "Micou Guardian Appointment."

On the 18th day of March, 1867, the said Micou wrote the said Lamar as follows:

MONTGOMERY, ALA., *March* 18, 1867.

G. B. LAMAR, Esq., *Savannah, Ga.:*

DEAR SIR: Enclosed please find official notice of my appointment as guardian of Ann C. Sims.

The delay was occasioned by the absence of my bondsmen from Montgomery. I entirely agree with you in your suggestions about arranging to get ownership of the whole tract of land, and will be pleased to sanction anything you see fit to do in the matter, or act myself upon any particular suggestion made. My latest accounts from my family represent all quite well. My hurt is getting well as fast as I
41 could reasonably hope. I am able to be at my office and attend to business.

Yours, very truly,

BENJ. H. MICOU.

On the 22d day of March, 1867, the said Lamar wrote the said Micou a letter, as follows:

SAVANNAH, *March* 22, 1867.

B. H. MICOU, Esq.:

DEAR SIR: I have yours 18th inst., with documents of the guardianship for Miss Ann C. Sims.

Since I wrote you I have ascertained that Mr. Nightingale has a mortgage on W. W. Cheever's half of the Florida land, and, therefore, that no arrangement of the kind proposed can be effected.

I will write to New York for some of the coupons sent there to be protested, and as soon as I get them I will be ready to transfer all the property over to you.

If you are likely to pass this way, I would be glad to do so personally. If not, I can send them by express.

I am glad to hear that your hurt is healing; the delay in hearing from you suggested that the contrary might be the case.

I am, etc.,

G. B. LAMAR.

On the 28th day of March, 1867, the said Micou, after the receipt of Mr. Lamar's said letter of the 22d of March, wrote to him as follows, from Montgomery, Ala.:

MONTGOMERY, ALA., *March* 28, 1867.

G. B. LAMAR, Esq., *Savannah, Ga.*:

DEAR SIR: Yours 22d to hand and contents duly noted. I do not expect to be in Savannah this season. Do not think I will be able to leave for England before 1st July.

When you are ready, better send the papers by express with such a receipt as you wish signed.

My hurt is almost well; my family quite well on 7th March.

Yours, very truly,

BENJ. H. MICOU.

42 On the 13th and 14th of May, 1867, the said Mr. Lamar wrote the said Micou certain letters, copies of which are not preserved, but which are referred to in the letter hereafter next quoted, of Mr. Micou.

On the said 14th day of May, 1867, the said Mr. Lamar, having made out a complete statement of the account of the said Martha M. Sims in account with himself as guardian, and of the said Mrs. Ann C. Sims in account with himself as guardian, transmitted the same in his said letter of the 14th of May to the said Micou, which statements of accounts are hereafter printed, marked Lamar Guardian Account, Nos. 1 and 2 respectively.

All the statements of accounts in each of the said accounts are correct statements of all the actual transactions made by Mr. Lamar as guardian.

On the 21st day of May, 1867, the said Benjamin H. Micou, having received Mr. Lamar's said letters of the 13th and 14th of May, 1867, and the said statement of account, wrote the said Mr. Lamar as follows from Montgomery, Ala.:

MONTGOMERY, ALA., *May* 21, 1867.

G. B. LAMAR, Esq., *Savannah, Ga:*

DEAR SIR: Yours of 13th and 14th inst. came duly to hand, but owing to my temporary absence in the country did not reach me till to-day. The package by express was duly received and contents as stated in your schedule.

I have to leave town again to-day, but will return on 24th, when I will mail to you a careful and full receipt for the contents of the package.

It would afford me great pleasure to visit Savannah, but my duties here are so pressing that if I visit Europe at all this summer, I can not leave until the very last day necessary to make the connection.

My latest accounts from my family, 2d May, represent all well, but anxious to return home.

Yours, very truly,

BENJ. H. MICOU.

On the 24th of May, 1867, the said Benjamin H. Micou, at
43 Montgomery, Ala., as the duly-appointed guardian of Ann C. Sims, received from the said Mr. Lamar, as guardian, certain bonds, coupons, deeds, notes, receipts, certificates, and checks, and gave his written receipt for the same as follows:

Schedule and receipt for certain property herein named, received of Gazaway B. Lamar, of Savannah, Ga., as the property of Ann C. Sims, minor, for which minor G. B. Lamar has heretofore been guardian, said property now transferred to Benjamin H. Micou, of Montgomery Co., Ala., duly appointed guardian at the request of said minor, Ann C. Sims, by the probate court of Montgomery Co., Ala.:

One bond of the East Tennessee and Georgia Railroad Company, No. 17, due 1st July, 1886, endorsed by Andrew Johnson, governor of the State of Tennessee, and W. N. W. Burton, secretary of state, on 4th August, 1856, for..	$1,000 00
Twelve past-due coupons of the same bonds, protested....	360 00
No. 631, one bond of the city of Mobile, due 1st January, 1880, endorsed by the Mobile and Great Northern Railroad Company, W. D. Dunn, president, and I. W. Allen, secretary, for.....	1,000 00
Nos. 3909 and 3910, two bonds of the city of New Orleans, dated 1st July, 1852, due 1st July, 1892, with coupons from July, 1866, each for $1,000.....	2,000 00
Nos. 1096 and 1126, two bonds of the city of Memphis signed by A. B. Taylor, mayor, endorsed by the Memphis and Little Rock Railroad Company, James M. Williamson, president, and by the State of Tennessee, Andrew Johnson, governor, April 10th, 1856, for $1,000 each.....	2,000 00
No. 1488, one bond of the city of Memphis, signed by Thomas B. Carroll, mayor, and endorsed by the Mem-	

44 phis and Little Rock Railroad Company, D. B. Turner, president, and by the State of Tennessee, Andrew Johnson, governor, March 21st, 1857, for..... 1,000 00
Twenty-four coupons, past due and protested, of bonds Nos. 1096 and 1126, $30 each..... 720 00
Twelve coupons, past due, and protested 22d January, 1867, of bond No. 1488, $30 each..... 360 00

$8,440 00

One deed of Whitner & Myers, masters, etc., to Wm. W. Cheever, dated 1st December, 1851, for 1,800 acres of land in Wakulla Co., Fla., with the acknowledgment of Wm. W. Cheever in writing thereon, 16th September, 1862, that W. W. Sims, his former partner, was entitled to one-half interest in the same, which half was sold by Wm. W. Cheever to James T. Archer and Richard A. Shine, both of whom died, not paying for any part of the same.

Also, deed from R. A. Shine, adm'r of Richard A. Shine, and deed from Mary S. Archer, adm'x of James T. Archer, each reconveying to G. B. Lamar, as guardian for Ann C. Sims, one-fourth of the said tract of 1,800 acres of land, in consideration of the surrender by him to each of them the note of James T. Archer and the note of Richard A. Shine, due and unpaid, for $2,500 each.

Also the conveyance of Richard M. Abercrombie, dated 10th of May, 1859, of all he then had or might have in the estate of W. W. Sims, in right of his late wife, then deceased.

Also two notes, each for $2,750, dated April 15th, 1859, of the said Rev. Richard M. Abercrombie, payable six months after his decease, without interest.

Also Mrs. Ann Sims' receipt for two bonds Confederate States 15 million loan for $1,000 each, dated August 10th, 1862.

Also Mrs. Ann Sims' receipt for Nos. 316, 317, 318, 319, 320, 321, and 322—seven bonds of the Confederate States' 15 million loan, dated March 12, 1863.

Also No. 132 Bank of Commerce certificate for thirty shares stock for Miss M. M. Sims, 8th July, 1857.

45 Also No. 133 Bank of Commerce certificate for thirty shares stock for Miss Ann C. Sims, 8th July, 1857.

Also No. 136 Bank of Commerce certificate for nine shares stock for Mrs. M. C. Abercrombie, 8th July, 1857.

Also No. 1655 Merchants' National Bank, Savannah, May 14th, 1867—one National Bank Republic of New York, for eight hundred and eight $\frac{70}{100}$ dollars, signed by George W. Davis, cashier, endorsed by G. B. Lamar, payable to the order of B. H. Micou, guardian of Ann C. Sims..... $808 70
Also Nos. 36, 43, 101, and 109—four bonds of the city of Mobile, for $100 each, due 1st July, 1873; coupons payable 1st July and 1st January, the first due 1st July, 1867..... 400 00
Brought forward..... 8,440 00

$9,648 70

Received the above and within stated bonds, coupons, deeds, notes,

receipts, certificates, and check, as stated, by express, from Gazaway B. Lamar, esq., of Savannah, Ga.

BENJAMIN H. MICOU,
Guardian of Ann C. Sims.

[U. S. int. rev. stamp, 2 cents.]

MONTGOMERY, ALA., *May* 24, 1867.

After the appointment of the said Benjamin H. Micou as guardian of the said Ann C. Sims, and his receipt from Mr. Lamar of the property set forth in the above receipt, Mr. Benjamin H. Micou continued in all respects to act as the sole and only guardian of Ann C. Sims until she became of age.

On the 19th of May, 1870, the said Benjamin H. Micou, as guardian of Ann C. Sims, wrote to Mr. Lamar as follows:

46 OFFICE OF THE TALLHASSEE MANUFACTURING CO.,
Montgomery, Ala., May 19, 1870.

G. B. LAMAR, Esq.:

DEAR SIR: Yours 10th inst. with Mr. Nightingale's proposition to hand.

I have redeemed one-half the Wakulla tract—namely, lots Nos. 17 and 20; paid taxes $84.89—for which I have receipt of comptroller and deed of surveyor-general. Now, if Mr. Nightingale redeems the other half for $250, the whole redemption money would be $334.89; my half would be $167.45. I have paid already $84.89, and balance would be $82.56. This amount I am willing to pay whenever Mr. Nightingale redeems the other two lots of land at $250. This, I think, is simple equity. Excuse my not answering sooner, as your letter reached here during my temporary absence.

Governor Phinizy is at present absent on a visit to Augusta, as is also Mrs. Sims. Will deliver your message to gov. when he returns. My family are pretty well.

Yours, very truly,

BENJ. H. MICOU,
Guardian for Ann C. Sims.

The said Ann C. Sims became of age on June 1st, 1872.

No objection or complaint was ever made against the said Mr. Lamar by the said Martha M. Sims or the said Ann C. Sims, or any of their relatives herein referred to, as to any transaction of the said Mr. Lamar in the matters of his acts or investments as guardian of the said Miss Martha M. Sims and the said Miss Ann C. Sims, until July 28th, 1874, when the said Benjamin H. Micou wrote from Tallassee Station, Ala., to the said Mr. Lamar, a letter, of which the following is a copy:

TALLASSEE, ALA., *July* 28, 1874,
Cowles' Station Post-Office.

Mr. G. B. LAMAR:

MY DEAR SIR: I write you in regard to your guardianship of Miss M. M. Sims and Ann C. Sims. I find on consultation with my legal adviser,

47 That I am not the legal guardian of Miss Ann C. Sims, because she already had one guardian, who as far as I know (in law), had neither died, resigned, or been discharged. The court of Alabama had no jurisdiction in this estate, and could not appoint until a settlement was made before the State court which had jurisdiction, and an order made for the removal of the estate to Alabama.

Miss Sims being of lawful age desires a settlement.

On showing the account rendered me by you, dated May 14th, 1867 (for your full understanding of the matter, I mail to you with a carefully taken copy of said account), has been carefully examined by a good lawyer, and after advising fully with him am informed,

That according to the present construction of the law in these matters, your account is not entitled to any credits for investments made by you in Confederate securities.

Nor could you, without an order of court, purchase bank stock or bonds, or make any investment, except to loan the money at your risk that it was fully secured.

My lawyer instructs me that the account marked B enclosed with this letter are the proper legal account you should render to your ward in settlement.

The papers marked B supposes you got no order of court to purchase the bank stock charged in your account. If, however, you got the order of court, thus making the purchase legal, you should also have the order of court for their sale. Failing in this, you are responsible for the value of the stocks and the dividend on same.

I have now stated the legal standing of the case. Miss Sims is now of lawful age, and is ready to accept any fair and reasonable settlement offered by you. She has been raised by her grandmother and aunt to look to you with the utmost respect and confidence, and is a lovely and amiable young lady, who is fully deserving of her whole little fortune; but if it troubles you to pay same would gladly abate claims to meet your ability to pay.

I have delayed making any claim for her, knowing you were in money trouble, and believing I was able to do for her myself. Lately, I
48 have heard of your recovery of a large sum due you by the U. S. Govt., and I have lately experienced reverses myself, which render me insolvent and unable to help the orphan I have raised up and educated and provided for as one of my own children since she came into my family in 1860. As proof of my own desires to do for her, I made a deed of gift to her when she became of age for ten thousand dollars, payable at her marriage or five years after date, eight per cent. interest to be paid her quarterly for her support till principal is paid. My misfortunes in business render me insolvent, and this deed of no value to her. The bonds sent to me have never been disposed of—could, when I supposed I was her guardian, get no offer for them, and they now have little or no value. Her lands in Florida are equally valueless; I have offered them for sale, and have never received a single offer, and they will pass from her ownership in a short time, as she being utterly without one cent of income, will not be able to pay the taxes.

With kindest regards, and the earnest assurance that I have no desire to annoy you in this writing, I am,

Yours, very truly,

BENJ. H. MICOU.

On the 26th of September, 1874, the said Mary Jane Micou wrote the said Lamar as follows from Tallassee, Ala.:

TALLASSEE, *Sept. 26th.*

MY DEAR UNCLE:

Mr. Micou wrote you some time since in reference to Nannie's affairs. The matter troubled me very much, both on account of all your past

kindness, and because I felt satisfied that, having undertaken the guardianship of my brother's children to please mother and through regard for their father, you had in all things acted as you believed best for them. That this is Mr. Micou's opinion also, you cannot doubt; but, as the only protector she has, he deemed it his duty, under the circumstances, to place the matter before you in a legal point of view which he supposed you had never before thought of. I write
49 now to say that he is anxious to know if you ever received his letter, and to hear your opinion upon the points he placed before you.

We were very sorry to see the death of Mr. Minar mentioned in a Virginia paper a few weeks ago. I suppose his little children will be taken charge of by their grandmother.

Doubtless it will grieve Miss Heyman very much if she has to give them up, she seemed so much attached to them.

I have heard nothing of Hattie's return, but I hope she is with you to help make life bright and cheerful. It must be a great comfort to have Charlotte and Derry, and the little grandchildren. I trust they are all in good health, and that you are all having a very pleasant summer.

Mother is in tolerable health, but subject to attacks of erysipelas. We are, like almost everybody else in this down-trodden section of country, trying to live in the forlorn hope of better times. But, from the outrageous slanders which are boldly proclaimed in the North, and the arrival of troops in the State, I fear it is a forlorn hope indeed.

We hear rumors of another marriage in Caro's family, from our friends in Augusta, but whether they are true I do not know.

Hoping this will find you well, and with much love to all your children who are with you. I am,

Very sincerely, your affectionate niece,

MARY J. C. MICOU.

At the time of the receipt of the two last-quoted letters, the said Mr. Lamar was sick at New York City, where he died on the 5th of October, 1874, without having replied to either of said letters.

All the letters hereinabove referred to were received by the parties to whom they were written in due course of mail, and the statements made in each of said letters were true.

"LAMAR GUARDIAN ACCOUNT NO. 1."

Miss M. M. Sims, in account with G. B. Lamar, her guardian.

1856.				
January	18.	To amount paid half letters guardianship		$3 75
		" amount paid Mrs. Abercrombie, tuition		12 00
		" 19 shares Bank Republic stock		2,090 72
April	8.	" Mrs. Abercrombie		125 00
		" Mrs. Abercrombie f r board and expenses from 23d November, 1850, to the 1st January, 1856		1,555 03
April	27.	" 7 shares Bank Republic		707 91
1857.				
January	3.	" Mrs. Abercrombie to date		125 00
March.		" first instalment on 25 shares Bank Commerce		625 00
		" second and third instalments on 25 shares Bank Commerce		
July	1.	" Mrs. Abercrombie to date		1,250 00
		" 5 shares Bank Commerce, 75 per cent. paid		125 00
		" instalment on 30 shares Bank Commerce		375 00
July	13.	" Dr. Green for services		750 00
		" passage to Augusta	$35 00	
			15 00	
October	1.	" Mrs. Abercrombie to date		50 00
1858.				62 50
June	8.	" Mrs. Anne Sims, on her account		
		" Dr. Green's bill		160 50
December	21.	" Dr. Gibbard's bill		2 00
1859.				60 00
March.		" check sent to Mrs. Anne Sims		
December	12.	" " " " "		125 00
1862.				125 00
September.		" her half cost of $5,000 8 per cent. Alabama bonds and $2,000 Confederate States $15,000,000 loan		3,617 90
		Carried forward		$11,947 31

51		To amount brought forward		11,947 31
March.		" her half of 7 Confederate States $15,000,000 loan, received for the Alabama bonds		$3,615 00
		" taxes		10 20
		" balance transferred at her decease to the credit of her only sister, Annie C. Sims		3,652 02

1856.				
January	1.	By amount received from her mother, Mrs. Abercrombie		$5,166 80
		" her half of $100 received from Mrs. Annie Sims		50 00
January	30.	" 2 dividends on 38 shares Bank Republic		190 00
		" 1 " " " " "		95 00
		" one-third of five dividends collected from the Mechanics' Bank of Augusta, which paid me the dividends, but refused to transfer the stock held in the name of Mrs. Abercrombie, administratrix, to date		150 00
		" balance due Mrs. Abercombie, half transferred to M. M. Sims		
August	15.	" dividend Bank Republic		1,555 03
		" interest to date		95 00
1857.				173 18
January.		" one-third of 2 dividends Mechanics' Bank		33 33
April.		" dividend Bank Republic		130 00
May	7.	" one-third of dividend Mechanics' Bank		20 00
July	1.	" dividend Bank of Commerce		113 75
October	1.	" " Bank Republic		130 00
"	31.	" one-third dividend Mechanics' Bank		16 66
1858.				
January.		" dividend Bank of Commerce		90 00
February.		" " Bank Republic		130 00
April.		" one-third dividend Mechanics' Bank		11 66
July.		" dividend Bank of Commerce		120 00
August.		" " Bank Republic		130 00
1859.				
January	8.	" " Bank Commerce		120 00
February.		" one-third dividend Mechanics' Bank		16 67
		Carried forward		$8,537 08

	By amount brought forward		$8,537 08
February.	" dividend Bank Republic		130 00
July.	" " Bank Commerce		130 00
	" one-half dividend Mechanics' Bank		105 00
April.	" " " " "		15 75
August.	" dividend Bank Republic		25 00
1860.			130 00
February.	" " "		
"	" one-half dividend Mechanics' Bank		130 00
"	" dividend Bank Commerce		25 00
March 27.	" one-half of B A. Marou's note collected		138 00
July.	" dividend Bank Commerce		491 15
	" one-half dividend Mechanics' Bank		120 00
August	" dividend Bank Republic		18 00
			130 00

			$19, 424 53

1861.			
February.	"	" " "	130 00
	"	" Bank Commerce	138 00
July.	"	" " "	138 00
1862.			
January.	"	" " " C. S. currency	138 00
July.	"	" " " "	862 50
	"	balance of interest to date, " "	294 05
1863.			
January.	"	dividend Bank Commerce, " "	517 50
	"	B. B. Micou for her half of Alabama bonds sold or exchanged by him	3, 605 00
July.	"	dividend Bank Commerce, C. S.	750 00
"	"	" " " "	112 50
	"	R. H. Lowry, cashier, for sales of Bank Republic stock, part	2, 054 00
1864.			
January.	"	dividend Bank Commerce	690 00
			$19, 424 53

52 "LAMAR GUARDIAN ACCOUNT No. 2."

Miss Annie C. Sims, in account with G. B. Lamar, her guardian.

1856.			
January	1.	To cash for letters of guardianship	$3 75
	"	" " for 19 shares Bank Republic, New York	2, 090 72
April	10.	" " to her mother, Mrs. Abercrombie	125 00
	"	balance to her mother from November, 1850, to 1 January, 1856	1, 555 03
September	27.	" 6 shares Bank Republic	606 95
1857.			
January	3.	" Mrs. Abercrombie	125 00
February	12.	" 75 per cent. on 25 shares Bank of Commerce	1, 875 00
July	1.	" Mrs. Abercrombie	125 00
"	1.	" 5 shares Bank Commerce, 75 per cent	375 00
"	1.	" in full on 30 shares Bank Commerce	750 00
"	13.	" Dr. Green, services	15 00
December	31.	" cash to Mrs. Abercrombie	128 12
1858.			
June.	"	" " " " to date	131 25
July.	"	" Dr. Green's bill	12 00
1859.			
January.	"	Mrs. Abercrombie	131 12
March.	"	cash sent to Mrs. Ann Sims	125 00
	"	" paid nurse	1 50
	"	" passage to Savannah, etc	26 50
	"	" Rev. Mr. Abercrombie	115 85
1860.			
February.	"	" sent to Mrs. Sims	125 00
		Carried forward	$8, 442 79

1856.			
January	1.	By cash from her mother, Mrs. M. C. Abercrombie	$5, 166 80
	"	her half of $100 of Mrs. Sims	50 00
	"	2 dividends Bank Republic	190 00
February	11.	" 1 " " "	95 00
	"	" one-third of 5 dividends Mechanics' Bank	150 00
"	11.	" Mrs. Abercrombie	1, 555 03
August	18.	" dividend Bank Republic	95 00
October	1.	" balance interest to date	174 07
"	1.	" one-third of 2 dividends Mechanics' Bank	33 33
1857.			
February	12.	" dividend Bank Republic	125 00
May	20.	" one-third dividend Mechanics' Bank	20 00
July	1.	" dividend Bank Commerce	113 75
August	14.	" " Bank Republic	125 00
	"	one-third dividend Mechanics' Bank	16 67
1858.			
January	11.	" dividend Bank Commerce	90 00
March	1.	" " Bank Republic	125 00
April	20.	" one-third dividend Mechanics' Bank	11 67
July	10.	" dividend Bank Commerce	120 00
October	11.	" " Bank Republic	125 00
1859.			
February.	"	" Bank Commerce	120 00
	"	one-third dividend Mechanics' Bank	16 66
"	23.	" dividend Bank Republic	125 00
		Carried forward	$8, 642 98

"*Lamar guardian account No. 2*"—Continued.

53		To amount brought forward	$8,442 79
1862.			
September.	"	her half 5,000 Alabama and 2,000 Confederate bonds	3,617 90
1863.			
March.	"	her half 7,000 Confederate bonds, bought by Mr. Micou	3,815 00
September 23.	"	city taxes	10 20
	"	Mr. Lowry, sales 51 share, Bank Republic stock, with others belonging to her and her sister, in trust	4,029 00
	"	Mr. Lowry, 3 Memphis bonds, $1,000 each. 1 Mobile bond, 1,000. 2 New Orleans bonds, 1,000 each. 1 E. and Georgia R. R. bond, 1,000	4,084 41
	"	taxes, $4.45; express, $5.43	9 88
	"	M. D. Papy, attorney, for getting deeds from the administrator of H. Archer and D. W. Shine, for her half of 1,800 acres land in Wabullac, Florida	115 00
	"	express on coupons to Mobile	4 00
	"	investing Mobile coupons in four new bonds, $100 ea.	400 00
	"	express on them	1 40
	"	notary for protesting $720 Memphis and $ E. T. and Georgia Railroad bonds in New York	15 00
	"	$149 in gold for Confederate notes on hand at the close of the war	*3,724 12
1867.			
May	10.	" balance due her in United States currency, and paid to B. H. Micou, esq., appointed by the court in Alabama to be my successor in the guardianship	659 70
		Carried forward	$28,925 40

		By amount brought forward	$8,642 98
July.		" dividend Bank Commerce	120 75
		" one-half dividend Mechanics' Bank	25 00
August	8.	" dividend Bank Republic	125 00
1860.			
February	13.	" " " "	125 00
"	13.	" one-half dividend Mechanics' Bank	25 00
		" dividend Bank Commerce	138 00
March	26.	" half B. A. Marou's note collected	491 16
July	10.	" dividend Bank Commerce	138 00
August	15.	" " Bank Republic	125 00
1861.			
February	13.	" " " "	125 00
March	1.	" " Bank Commerce	138 00
August	9.	" " " "	138 00
1862.			
January	9.	" " " "	138 00
July	17.	" " " "	872 50
October.		" balance interest to date	294 05
1863			
January	8.	" dividend Bank Commerce	517 50
"	8.	" B. H. Micou for her half, sale of $5,000 Alabama bonds	3,605 00
July.		" dividend Bank Commerce	862 50
		" R. H. Lowry, part sales of her Bank Republic (sold) stock in 1862	1,975 00
1864.			
July.		" dividend Bank Commerce	690 00
December.		" " " "	690 00
1866.		" amount due her sister, M. M. Sims, deceased, in Confederate currency, transferred to her, the only heir	3,652 02
		Carried forward	$23,643 46

54	To amount brought forward	$28,928 40		By amount brought forward	$23,643 46
			1866.	" sales 51 shares Bank Republic stock	3,983 12
				" balance on ditto, including interest, collected by Mr. Lowry	835 67
			1867.	" premium on $149 gold, in greenbacks, 35 per cent	52 15
			April.	" Mobile coupons invested in new bonds, and charged in this account	414 00
		$28,928 40			$28,928 40
				" balance brought down	659 70
				" error in Confederate currency, $3,724.12, which entitled her to a credit of $1.49 in gold, the premium on which in greenbacks, $52.15, is credited	149 00
					$808 70

E. and O. E. MAY 14, 1867.

G. B. LAMAR, *Guardian.*

55 *Micou guardian appointment.*

THE STATE OF ALABAMA,
Montgomery County:

Special court of probate.

MARCH 15, 1867.

Present, David Campbell, judge.

This day came Benjamin H. Micou and applied for letters of guardianship on and over the property of Ann C. Sims, a minor, and it appearing to the court that the said Ann C. Sims is over the age of fourteen years;

And the said Benjamin H. Micou having produced and filed in this court the written consent of the said Ann C. Sims, a minor, nominating and appointing him, the said Benjamin H. Micou, as her guardian;

And the said Benjamin H. Micou having entered into bond in the sum of fifteen thousand dollars, with Thomas M. Barnett and Nicholas D. Barnett as his securities, which bond is approved and ordered recorded:

It is therefore ordered and decreed by the court that letters of guardianship on and over the property of Ann C. Sims, a minor, be granted and issued to the said Benjamin H. Micou, which is done; and ordered that the said guardian make return of an inventory of said minor's estate to this court within sixty days.

DAVID CAMPBELL, *Judge.*

Guardian's bond.

THE STATE OF ALABAMA,
Montgomery County:

Know all men by these presents that we, Benjamin H. Micou, Thomas M. Barnett, and Nicholas D. Barnett, of the county and State aforesaid, are held and firmly bound unto David Campbell, judge of
56 the court of probate for said county, and his successors in office, in the penal sum of fifteen thousand ($15,000) dollars, for which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that whereas the above-bound Benjamin H. Micou has been appointed guardian of the estate of Ann C. Sims, a minor: Now, if the said Benjamin H. Micou shall well and truly perform all the duties which are or may be by law required of him as such guardian, then the above obligation to be void; otherwise to remain in full force.

BENJ. H. MICOU. [SEAL.]
T. M. BARNETT. [SEAL.]
N. D. BARNETT. [SEAL.]

Taken, approved, and ordered to be recorded.

DAVID CAMPBELL, *Judge of Probate.*

Letters of guardianship.

THE STATE OF ALABAMA,
Montgomery County:

Court of probate.

MARCH 15, 1867.

Be it remembered and made known to all whom it may concern, that on the application of Benjamin H. Micou to my said court, I have caused these letters of guardianship to issue in favor of the said Benjamin H. Micou in and upon the goods and chattels, rights and credits of Ann C. Sims, a minor, and in every case which occasion may require the said Benjamin H. Micou is authorized to bring suit and be sued as the lawful guardian to the said Anna C. Sims, a minor.

57 Witness David Campbell, judge of our said court, this 15th day of March, A. D. one thousand eight hundred and sixty-seven, and 91st year of American Independence.

DAVID CAMPBELL, *Judge of Probate.*

THE STATE OF ALABAMA,
Montgomery County:

I, David Campbell, judge of the court of probate in and for said county and clerk ex officio thereof, which court is a court of record, having a seal, hereby certify that the foregoing pages contain a full, true, and correct transcript from the records of said court of the appointment and qualification of Benjamin H. Micou as guardian of the property of Ann C. Sims, a minor, to which is appended a copy of the bond and letters of said guardian as the same appears of record in said court. I further certify that this certificate is in due form of law, and by the proper officer.

[Revenue stamp, 1 dollar.]

Given under my hand and seal of office this 16th day of March, 1867.

[SEAL.] DAVID CAMPBELL, *Judge of Probate.*

[5 ct. rev. stamp.]

58 *Suggestion of death of complainant.*

U. S. circuit court, southern district of New York.

ANN C. SIMMS
vs.
G. DE ROSSET LAMAR, EXECUTOR, &C.

The undersigned hereby give the court to understand that during the pending of this action, to wit, on or about the 7th of May, 1878, Ann C. Simms, the complainant hererein, died.

NASH & HOLT,
50 *Wall st., New York, former Solicitors for said Complainant.*

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Ann C. Sims vs. G. De Rosset Lamar, executor, &c. Suggestion of death of complainant. Nash & Holt, former solicitors for complainant.

59 U. S. circuit Court. Filed May 25, 1878. John I. Davenport, clerk.

60 To the Hon. Charles W. Buckley, judge of the court of probate of the county of Montgomery and State of Alabama:

Your petitioner, Benjamin H. Micou, respectfully represents unto your honor that the late Ann C. Sims, who was an inhabitant of this county at the time of her death, departed this life on the seventh day of May, one thousand eight hundred and seventy-eight, leaving a last will and testament, duly signed and published by her, and attested by B. D. Fry, C. E. Boykin, and L. B. Micou, who reside in this county, in which your petitioner, as he verily believes, is named as executor thereof, which said will is herewith produced to your honor, and propounded for probate and record in this court.

Your petitioner further states that the only next of kin of said decedent are her two first cousins, one of whom is Benjamin Micou, a minor, under the age of fourteen years, who resides with his father, your petitioner, in this county, and the other is George C. Mason, who is of full age, and resides at Newport, in the State of Rhode Island, and is a non-resident of the State of Alabama.

In consideration of all of which, your petitioner prays that a day may be set for the hearing of the matter of this petition; that subpœnas may issue to bring in said subscribing witnesses to testify on such appointed day; that due notice of this application may be given to said next of kin of said deceased, and that such other proceedings, orders, and decrees may be had and made in the premises as may
61 be requisite and proper to effect the due probate and record of said will according to law.

BENJAMIN H. MICOU.

Sworn to and subscribed before me this 13th day of May, A. D. 1878.

C. W. BUCKLEY,
Judge Probate Court.

(Endorsed:) Ann C. Sims, deceased. Petition of Benjamin H. Micou to probate will. Filed in office on the 13th May, 1878, and 5th June, 1878, set for hearing. C. W. Buckley, judge probate court, Montgomery County.

Last will and testament of Ann C. Sims.

I, Ann Creswell Sims, being of sound mind and disposing memory, do hereby make, publish, and declare this to be my last will and testament:

ITEM 1ST. I will that all my just debts be first paid by my executor hereinafter named.

ITEM 2D. I give and bequeath to my aunt, Mary Jane C. Micou, wife of Benjamin H. Micou, all the rest and residue of my estate of whatever kind or description, whether real or personal, and wherever situated, embracing all choses in action, claims, and demands of whatever kind, including the claims I am now prosecuting in the State of New York against the executor of the estate of Gazaway B. Lamar on my own account and as administratrix of the estate of Martha M. Sims.

ITEM 3D. I hereby constitute and appoint Benjamin H. Micou executor of this my last will and testament, and I particularly direct
62 that he shall not give bond for the performance of the duties of said office. And I hereby invest my executor with full power to sell any real estate of which I may die seized, or to which I may become entitled, or my estate may acquire after my death, to collect all

claims due to me, to sell or compromise at his discretion, and in any way he think best, any claims of any kind due to me in any capacity; and in fine, to do any and every thing that in his discretion he may believe to be to the interest of my estate.

In testimony whereof I have hereunto set my hand and seal this fourteenth day of April, A. D. 1878.

ANN CRESWELL SIMS. [SEAL.]

In the presence of—
B. D. FRY.
C. E. BOYKIN.
L. D. MICOU.

Probate court.

STATE OF ALABAMA,
Montgomery County:

In the matter of the probate of the last will and testament of Ann Creswell Sims, deceased.

Before me, Charles W. Buckley, judge of the said probate court, personally appeared in open court B. D. Fry, who being by me first duly sworn and examined, did and does depose and say, on oath, that he is a subscribing witness to the instrument of writing now shown to him, and which purports to be the last will and testament of Ann Creswell Sims, deceased, signed and executed said instrument on the day the same bears date, and declared the same to be her last will and testament, and affiant set his signature thereto on the day the same bears date, as subscribing witness to the same, in the presence of said testatrix, and the subscribing witnesses and of each other. That said testatrix was of sound mind and disposing memory, and in the opinion of deponent fully capable of making her will at the time the same was so made as aforesaid. Affiant further states, that said testatrix
63 was on the day of the said date of said will of the full age of twenty-one years and upwards.

B. D. FRY.

Subscribed and sworn to before me this 5th day of June, A. D. 1878.

CHARLES W. BUCKLEY,
Judge Probate Court.

Probate court.

STATE OF ALABAMA,
Montgomery County:

I, Charles W. Buckley, judge of probate court in and for said county and State, do hereby certify that the within instrument, in writing, has this day in said court, and before me as the judge thereof, been duly proven by the testimony of B. D. Fry, a subscribing witness, to be the genuine last will and testament of Ann Creswell Sims, deceased, and that said will, together with the proofs thereof, has been recorded in my office in book No. 5 of wills at page .

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 5th day of June, A. D. 1878.

CHARLES W. BUCKLEY,
Judge Probate Court, Montgomery County.

Ann C. Sims, deceased, in the matter of the probate of her last will and testament.

This day having been regularly appointed for hearing the application of Benjamin H. Micou, which was heretofore filed in this court for the probate of an instrument of writing purporting to be the last will and testament of said deceased, now comes the said applicant and also comes Benjamin Gardner, esq., who was heretofore duly appointed by the order of this court, and who now consents to act as guardian ad litem for Benjamin Micou, a minor, under the age of fourteen
64 years, son of Benjamin H. Micou, and one of the heirs at law of said deceased, and it appearing to the satisfaction of the court that the notice of the said application and of the time appointed for hearing the same has been given in pursuance of law, and in strict accordance with the former order of this court made and entered in the premises on the 13th day of May, 1878, by publication continued for three successive weeks in the Montgomery Daily Advertiser, a newspaper published in said county, and by citation personally served as directed in said former order, now, on motion of said Benjamin H. Micou, the court proceeds to hear said application;

And it appearing to the satisfaction of the court from the testimony of B. D. Fry that he signed said instrument of writing purporting to be the last will and testament of the said decedent, and which writing is now shown to him, on the day of the date thereof, in the presence of said testatrix, and at her request as subscribing witness to the same, the said testatrix then declaring that said instrument constituted her last will, and that Clara E. Boykin and Lucy B. Micou, the other subscribing witness to said instrument, also signed the same in his presence and in the presence of the said testatrix, and that said testatrix signed the same in his presence and that of the other subscribing witnesses;

And it also being shown by proof which is satisfactory to the court that the said testatrix was of the full age of twenty-one years and upwards at the time of making said will, and that she was of sound mind and fully capable of making said will, it seems to the court that said application should be granted.

It is therefore ordered, adjudged, and decreed by the court that said will of said Ann C. Sims, deceased, be received, and the same is hereby declared to be duly proven as the last will and testament of said decedent, and as such admitted to probate, and ordered to be recorded, together with the proofs thereof, and all other papers on file relating to this proceeding.

It is further ordered that said applicant pay the costs of this proceeding.

CHARLES W. BUCKLEY,
Judge of the Probate Court, Montgomery County.

JUNE 5TH, A. D. 1878.

65 Probate court.

STATE OF ALABAMA,
Montgomery County:

I, Charles W. Buckley, judge of the probate court in and for the county and State aforesaid, and ex officio clerk of said court, the same being a court of record, and having a seal but no regular clerk and custodian of its records and proceedings, do hereby certify that the

foregoing pages contain a true, correct, and complete transcript of the petition of Benjamin H. Micou for the probate of the last will and testament of Ann C. Sims, deceased, the will of said decedent, together with the affidavit of B. D. Fry, a subscribing witness to said will and certificate of record, and of the order admitting said will to probate as fully as the same appear of record in said court.

And I further certify that this certificate is in due form as and for an authentication of the records and judicial proceedings of said probate court under the laws of the State of Alabama.

In witness whereof I have hereunto set my hand and affixed the seal of the said probate court this 5th day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of the American Independence the 102d year.

[STATE SEAL.] CHARLES W. BUCKLEY,
Judge Probate Court, Montgomery County.

SURROGATE'S OFFICE,
County of New York:

I, Delano C. Calvin, surrogate of the county of New York, do hereby certify that the last will and testament of Ann C. Sims, late of Montgomery County, in the State of Alabama, deceased, has been admitted to probate as to personal property, upon the production of a duly-authenticated copy thereof, and I further certify that the foregoing is a correct record of such authenticated copy.

In witness whereof I have hereunto set my hand this seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy-eight, in pursuance of chapter 274 of the laws of 1877.

PETER V. BURTSELL,
Clerk to the Surrogate's Court.

66 STATE AND COUNTY OF NEW YORK,
Surrogate's Office, ss:

I, Peter V. Burtsell, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the last will and testament of Ann C. Sims, deceased, together with the probate thereof, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of office of said surrogate this 29th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

[L. S.] PETER V. BURTSELL,
Clerk to the Surrogate's Court.

STATE AND COUNTY OF NEW YORK,
Surrogate's Office, ss:

I, Delano C. Calvin, surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that the foregoing exemplification of the last will and testament of Ann C. Sims, deceased, together with the probate thereof, is authenticated in due form, and by the proper officer.

In testimony whereof I have hereunto set my hand and affixed the seal of the surrogate's court this 29th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

[L. S.] D. C. CALVIN,
Surrogate.

The people of the State of New York to Mary J. C. Micou, of Tallassee, Alabama, the sole legatee named in the last will and testament of Ann C. Sims, deceased, send greeting:

Whereas said Ann C. Sims, lately departed this life, having previously duly made and executed her last will and testament; and whereas said will was, on the 17th day of June, in the year one thousand eight hundred and seventy-eight, duly admitted to probate by Delano C. Calvin, esquire, surrogate of the county of New York,
67 on an exemplified copy thereof; and whereas the said testatrix named and appointed Benjamin H. Micou her sole executor in and under her said last will and testament; and whereas the said Benjamin H. Micou has renounced his right to act as such executor; and whereas the said testatrix was not, at or immediately previous to her death, an inhabitant of the county of New York, but leaving assets therein, by means whereof the proving and registering of said will, and the ordering and granting administration of all and singular the goods, chattels, and credits whereof the said testatrix died possessed in the State of New York, and also the auditing, allowing, and final discharging the account thereof doth appertain unto us; and we being desirous that said will should be observed and performed, and that the goods, chattels, and credits of said testatrix should be well and faithfully administered, applied, and disposed of, do grant unto you, the said Mary J. C. Micou, full power and authority, by these presents, to administer and faithfully to dispose of all and singular the said goods, chattels, and credits, and to ask, demand, recover, and receive the debts which unto the said testatrix whilst living and at the time of her death did belong, and to pay the debts which the said testatrix did owe, as far as such goods, chattels, and credits will thereto extend, and the law require, hereby requiring you to observe and perform the said last will and testament, and to observe and perform all the duties to which you would have been subject if you had been named executrix thereof; and we do by these presents depute, constitute, and appoint you, the said Mary J. C. Micou, administratrix, with the will annexed, of all and singular the goods, chattels, and credits which were of said Ann C. Sims, deceased.

In testimony whereof we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, Delano C. Calvin, surrogate of said county, at the city of New York, this eighteenth day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

[L. S.] D. C. CALVIN,
Surrogate.

68 Circuit court of the United States for the southern district of New York, in the second circuit.

To the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

Mary J. C. Micou, of the town of Tallassee, in the State of Alabama, and a citizen of the State of Alabama, as administratrix, with the will annexed, of all the goods, chattels, and credits which were of Ann C. Sims, deceased, brings this her bill against G. De Rosset Lamar, of the city, county, and State of New York, and a citizen of the State of New York, as executor of the last will and testament of Gazaway B. Lamar, deceased.

And thereupon your oratrix complains and says that Ann C. Sims,

late of the town of Tallassee, in the State of Alabama, but now deceased, on or about August 3d, 1875, began a suit in the supreme court of the State of New York by the service upon the said G. De Rosset Lamar of the original summons and complaint therein; that thereafter such proceedings were taken by the said defendant Lamar in said supreme court that by reason thereof and by the laws of the United States applicable thereto, and by an order duly entered and dated October 9th, 1875, the said cause was duly removed into this court. That thereupon the said original bill of complaint, or a duly-certified copy thereof, included in a duly-certified copy of the record in said cause, was duly transferred to, and filed in, the office of the clerk of this court. That thereafter and on or about December 7, 1875, said defendant duly appeared in said suit and filed his answer therein. That thereafter testimony was taken and such proceedings had that the said suit, on May 7th, 1878, was, and for a long time had been, ready to be heard
69 upon the pleadings and proofs, and was upon the equity calendar of this court waiting to be reached for argument. That in and by said action the plaintiff demanded certain relief against the defendant, as executor of the last will and testament of Gazaway B. Lamar, deceased, as in and by said proceedings will more fully and at large appear. That on or about the said 7th day of May, 1878, the said Ann C. Sims departed this life, not being at or immediately previous to her death an inhabitant of the county of New York, but leaving assets therein, and having before her death duly made and published her last will and testament in writing, and therein appointed Benjamin H. Micou the executor thereof. That the said will was, on or about June 17th, 1878, duly admitted to probate by the surrogate of the county of New York, to whom jurisdiction in that behalf belonged. That the said Benjamin H. Micou has duly renounced the executorship of said will and declined to act in the trusts thereof, and that your oratrix has duly obtained letters of administration, with the will annexed, of the goods, chattels, and credits which were of said Ann C. Sims, deceased, dated June 18th, 1878, and duly granted to her by the surrogate of the county of New York, having jurisdiction for that purpose, and has thereby become, and now is, her legal personal representative.

And your oratrix further shows that the said suit and proceedings have become abated by the death of the said Ann C. Sims, and your oratrix is, as she is advised, entitled to have the said suit and proceedings revived against the said defendant, G. De Rosset Lamar, as executor as aforesaid, and to have the said cause put in the same plight and condition as it was in prior to the abatement thereof as hereinbefore alleged.

To the end, therefore, that the said defendant may answer the premises, and that the said suit and proceedings which became abated as aforesaid may stand revived, and be in the same state and condition as the same were in at the time of the death of the said Ann C. Sims, or that the defendant may show cause to the contrary, may it please your honors to grant unto the oratrix a writ of subpœna to revive, issuing out of and under the seal of this honorable court, to be directed to the said G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, thereby commanding him at a certain day to appear before your honors in this honorable court
70 and show cause, if any he have, why the said suit and proceedings should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abate-

ment thereof, and further to stand to and abide such order and decree in the premises as to your honors shall seem meet.

And your oratrix will ever pray, &c.,

NASH & HOLT,
Solicitors for Complainant, 50 *Wall St., N. Y.*

S. P. NASH, *of Counsel.*

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

George C. Holt, being duly sworn, says that he is one of the firm of Nash & Holt, the complainant's solicitors herein; that he has read the above bill and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and to those matters he believes it to be true. That this verification is not made by the complainant because, as deponent believes, she is now absent from said district and at Alabama, and because most of the allegations of said bill are within the knowledge of deponent; that deponent's knowledge is derived from his having attended to obtaining the complainant's letters of administration from the New York surrogate's office, and his information from the papers used in said proceedings, and from letters and telegrams received by deponent's firm accompanying or relating thereto.

GEO. C. HOLT.

Sworn to before me, this 20th day of June, 1878.

HERMAN DRISLER,
(144) *Notary Public, N. Y. Co.*

71 U. S. circuit court, southern district of New York.

ANN C. SIMS
vs.
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased.

In equity. June 22, 1878. Nash & Holt, complainant's solicitors.

On filing the bill of revivor brought by Mary J. C. Micou, as administratrix, with the will annexed, of Ann C. Sims, and on motion of Nash & Holt, solicitors for complainant—

72 Ordered, that defendant demur or plead to said bill on or before the next rule day which shall occur after fourteen days from the time of the service of the subpœna to revive, and that in default thereof this suit be revived and proceed in the name of Mary J. C. Micou, administratrix as aforesaid, as complainant.

73 United States circuit court, southern district of New York. In equity.

MARY J. C. MICOU, AS ADMINISTRATRIX, WITH will annexed, &c., of Ann C. Sims,
vs.
G. DE ROSSET LAMAR, AS EXECUTOR.

MARY J. C. MICOU, AS ADMINISTRATRIX DE bonis non of M. M. Sims
vs.
G. DE ROSSET LAMAR, AS EXECUTOR.

DEAR SIRS: Take notice that we appear as solicitors for defendant in the above suits.

Dated July 1st, 1878.

Yours, &c.,

DICKERSON & BEAMAN,
Staats Zeitung Building, New York City.

To NASH & HOLT, Esqrs.,
Complainant's Solicitors.

74 United States circuit court, southern district of New York. In equity.

G. DE ROSSET LAMAR, AS EXECUTOR OF THE will of Gazaway B. Lamar,
against
MARY J. C. MICOU, AS ADMINISTRATRIX, WITH the will annexed, of Ann C. Sims.

To the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

Your orator complaining showeth unto your honors that your orator is the defendant in a suit now pending before your honors in the southern district of New York, which suit was originally brought in the supreme court for the county and State of New York, by Ann C. Sims, against your orator, as executor of the last will and testament of Gazaway B. Lamar, deceased, which suit has since been duly removed into the circuit court of the United States for the southern district of New York, in which suit the said Ann C. Sims alleged that the said Gazaway B. Lamar had been duly appointed the guardian of her the said Ann C. Sims by the surrogate of the county of Richmond, State of New York, and had failed to render an account of the said guardianship; and that the said Ann C. Sims had become of full age, and had demanded from the said Gazaway B. Lamar, and after his death from your orator, that he shall render to the said Ann C. Sims a just and true account of all moneys and property received by said Gazaway B. Lamar as her guardian, and of his guardianship in all respects; and that the said Gazaway B. Lamar and your orator had neglected so to do; and the said Ann C. Sims therefore prayed that an account be taken of all the transactions of the said Gazaway B. Lamar, as such
75 guardian of her the said Ann C. Sims, and that your orator, as executor of the said Gazaway B. Lamar, account to the said Ann C. Sims for all the property, assets, and effects of the said Ann C. Sims which had passed into your orator's possession as executor aforesaid upon the death of said Gazaway B. Lamar; and that the said Ann C. Sims have judgment against your orator for the balance found to be due to her upon such accounting.

And your orator further shows unto your honors that your orator, through his counsel, Messrs. Dickerson & Beaman, made answer unto the said bill of complaint, alleging, in substance, that after the appointment of the said Gazaway B. Lamar as guardian of the said Ann C. Sims, the said Lamar and the said Ann C. Sims being residents and citi-

zens of the State of Georgia and Alabama, respectively, a war arose between the United States of America and the Confederate States of America, and that by reason of said war and the said residence of said Lamar and the said Ann C. Sims the relation of guardian and ward had ceased and determined, so far as the same depended upon the orders or decrees of the surrogate court of said Richmond County.

And your orator further shows unto your honors that in said answer your orator further alleged that the said Gazaway B. Lamar invested the property of the said Ann C. Sims in such securities as he might lawfully do, and as he was requested to by the natural guardians of the said Ann C. Sims, and that afterwards, at the written request of the said Ann C. Sims and her natural guardians, one Benjamin H. Micou was appointed legal guardian of the said Ann C. Sims by the probate court of Montgomery County, in the State of Alabama, and that thereupon the said Gazaway B. Lamar accounted with and paid over to the said Benjamin H. Micou, guardian, all the estate with which he was chargeable as guardian of the said Ann C. Sims, and received from the said Micou, as guardian, a full release therefor, and that the said Ann C. Sims ratified and confirmed the same after she became of age.

And your orator further shows unto your honors that after the said suit was at issue it was noticed for trial, to be heard upon an agreed statement of facts, and that the same has been on the equity calendar of the circuit court for the last two terms, but has not been reached.

And your orator further shows unto your honors that while this suit was thus pending, and at or about the 7th day of May,
76 1878, the said Ann C. Sims departed this life, having before her death duly made and published her last will and testament in writing, and therein appointed the aforesaid Benjamin H. Micou the executor thereof. That said will was thereafter admitted to probate by the surrogate of the county of New York, and that the said Benjamin H. Micou renounced the executorship therein, and that thereupon the said Mary J. Micou, the defendant herein, obtained letters of administration, with the will annexed, of the goods, chattels, and credits which were of said Ann C. Sims, deceased, and thereupon brought her bill of revivor in this court, praying that your orator might show cause, if any he had, why the said suit and proceedings of Ann C. Sims against your orator should not stand and be revived against him, and be in the same plight and condition as the same were at the time of the abatement thereof by the death of the said Ann C. Sims.

And your orator further shows unto your honors that such proceedings have been had in said suit that the same now stands revived as a suit of Mary Jane Micou, as administratrix of the will annexed of Ann C. Sims, deceased, against your orator, as executor of the said last will and testament of Gazaway B. Lamar, all of which, as hereinbefore alleged, will more fully appear by reference to the original and subsequent proceedings in the said cause now remaining filed as of record in this honorable court, reference being thereunto had.

And your orator further shows unto your honors that the said Mary J. C. Micou was the sister of the father of the said Ann C. Sims, and that in 1859, and soon after the appointment of said Gazaway B. Lamar as the guardian of the said Ann C. Sims, the said Ann C. Sims lived and resided with her grandmother, Mrs. Ann Sims, and her said aunt, Mary J. C. Micou, they being her natural guardians, and that the aforesaid Benjamin H. Micou was the husband of the said Mary J. Micou, who lived with him.

And your orator further shows unto your honors that whatever was done by the said Gazaway B. Lamar, as guardian of the said Ann C. Sims, was authorized and approved by the said Mary J. C. Micou, and by the said Mrs. Ann Sims, and by the said Benjamin H. Micou, as the natural guardians of the said Ann C. Sims, each of the said three natural guardians being of lawful age.

77 And your orator further shows unto your honors that the said Ann C. Sims in her last will and testament, after directing that her just debts should be paid, gave and bequeathed to her said aunt, Mary J. C. Micou, wife of the said Benjamin H. Micou, as sole legatee, all the rest and residue of her estate of whatever kind or description, whether real or personal, and wherever situated, embracing all choses and claims and demands of whatever kind, including the claim she was then in said suit, as aforesaid, prosecuting on her own account against your orator, as aforesaid, and in said will she further appointed the aforesaid Benjamin H. Micou as executor of her said will, but that the said Benjamin H. Micou, for some reason unknown to your orator, renounced the execution of the trusts of said will, and that the said will has been duly admitted to probate by the surrogate of the county of New York, having first been probated in the county of Montgomery, State of Alabama, and that the said Mary J. C. Micou has been appointed and qualified as administratrix, with the will annexed, and that there are no just debts of the said Ann C. Sims remaining unpaid.

And your orator further showeth unto your honors that by reason of said last will and testament of said Ann C. Sims, deceased, the said defendant, Mary J. C. Micou, is now entitled under said will to receive for her own benefit and as her own property whatever may be recovered in said suit against your orator, as executor of the said Gazaway B. Lamar, by reason of any act of the said Gazaway B. Lamar with reference to his guardianship as aforesaid of the said Ann C. Sims, all of which acts the said Mary J. C. Micou, as one of the natural guardians of said Ann C. Sims, approved and ratified, and thereby is estopped from averring that they were not in every respect right, proper, and legal in the premises, and is therefore not entitled to recover in said suit.

And your orator further charges that under the circumstances aforesaid he is unable to plead said estoppel in issue, or to use the same as a plea in bar in the said suit, all of which actings and pretences are contrary to equity and good conscience and tend to the injury and oppression of your orator.

Wherefore and forasmuch as your orator has no remedy without the assistance of the court of equity, to the end therefore that the said Mary J. C. Micou, as administratrix of the will annexed of Ann C. Sims, may full, true, direct, and perfect answers make, upon her corporal oath, according to the best of her respective knowledge, in-

78 formation, and belief, to all and singular the matters and charges aforesaid, and that as full and particular in every respect as if the same were here again reported and she thereunto particularly interrogated;

And that the facts herein alleged by your orator may be established and declared by this honorable court as a sufficient bar to any further proceeding by the said Mary J. C. Micou as administratrix in the said suit;

And that the said bill of the said Mary J. C. Micou, as administratrix therein, may, under the circumstances, be forthwith dismissed, with costs;

And that your orator may have such further relief or may have

such other relief as the nature of his case shall require and as shall be agreeable to equity;

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said Mary J. C. Micou, commanding her by a certain day and under a certain penalty therein to be inserted to be and appear before this honorable court, and then and there answer the premises; and further to stand and abide the said order and decree therein as shall be agreeable to equity and good conscience.

And your orator will ever pray.

DICKERSON, BEAMAN & DICKERSON,
Solicitors for Complainant, and of Counsel,
Staats Zeitung Building, New York City.

STATE OF NEW YORK,
City and County of New York, ss:

G. De Rosset Lamar, being duly sworn, says that he is the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

G. DE R. LAMAR.

Sworn to and subscribed before me this third day of October, 1878.
[SEAL.] WM. S. BEAMAN,
Notary Public, City and County of New York.

79 Circuit Court of the United States for the southern district of New York. In equity.

G. DE ROSSET LAMAR, AS EXECUTOR, &c., of Gazaway B. Lamar, deceased,
vs.
MARY J. C. MICOU, AS ADMINISTRATOR, WITH the will annexed, &c., of Ann C. Sims, deceased.

The answer of Mary J. C. Micou, as adminstrator, with the will annexed, of the goods, chattels, and credits which were of Ann C. Sims, deceased, defendant to the bill of complaint of G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, complainant.

This defendant, reserving to herself all right of exception to said bill of complaint, for answer thereto says:

Defendant admits that the complainant is a defendant in a suit now pending in this court; that said suit was originally brought in the supreme court of the State of New York, by Ann C. Sims, against the complainant herein, as executor of the last will and testament of Gazaway B. Lamar, deceased; that said suit has since been duly removed into this court, and that in said suit said Ann C. Sims alleged facts and prayed for relief substantially as stated in the complainant's bill of complaint herein, but for greater certainty defendant craves leave to refer to said original complaint, now on file in this court, when the same shall be produced.

Defendant admits that complainant herein answered the said bill of

complaint in said original suit, alleging facts substantially as stated in the complainant's bill of complaint herein, but for greater cer-
80 tainty defendant craves leave to refer to said original answer now on file in this court, when the same shall be produced.

Defendant admits that said original suit was long since at issue, and on the equity calendar of this court for trial, but has not been reached.

Defendant admits that while said suit was thus pending, and on or about May 7th, 1878, the said Ann C. Sims died, having, theretofore, duly made her will, and having therein appointed Benjamin H. Micou, executor thereof; that said will was duly admitted to probate by the surrogate of the county of New York; that said Benjamin H. Micou renounced the executorship thereof; that Mary J. C. Micou, the defendant herein, thereupon obtained from said surrogate letters of administration with the will annexed, of the goods, chattels, and credits, which were of said Ann C. Sims, deceased, and that defendant as such administrator, thereupon brought her bill of revivor in this court praying for relief substantially as alleged in the bill of complaint herein, but for greater certainty defendant craves leave to refer to said bill of revivor, now on file in this court, when the same shall be produced.

Defendant admits that such proceedings have been had in said suit; that the same stands now revived as a suit of defendant, as such administrator, against said G. De Rosset Lamar, as such executor.

Defendant admits that she is the sister of the father of said Ann C. Sims, and that in 1859, said Ann C. Sims lived and resided with her grandmother, Mrs. Ann Sims, but defendant denies that this was soon after the appointment of Gazaway B. Lamar, as guardian for said Ann C. Sims, and alleges that more than three years had passed after such appointment before said Ann C. Sims went to reside with her said grandmother, and defendant alleges that when said Ann C. Sims came to reside with said Ann Sims in the spring of 1859, she, the defendant, was an unmarried woman, residing with her mother, said Ann Sims, and that said Ann C. Sims and defendant resided together with said Ann Sims; and defendant denies that said Ann C. Sims resided with defendant in 1859, except as above admitted, or that defendant was her natural guardian or her guardian in any respect, natural or otherwise, and defendant admits that Benjamin H. Micou became her husband in January, 1860, and that defendant has since lived with her said husband.

81 Defendant denies that whatever was done by the said Gazaway B. Lamar, as guardian of said Ann C. Sims, was authorized and approved by defendant, or by Ann Sims, or by Benjamin H. Micou. Defendant admits that in some few instances said Benjamin H. Micou, Ann Sims, and defendant, or some of them, knew of some of said Gazaway B. Lamar's acts as such guardian, but defendant alleges that said persons, including defendant, were wholly ignorant of most of his acts as such guardian, and denies that they or any of them, as natural guardians or otherwise, authorized or approved the acts of said Gazaway B. Lamar, as such guardian, and avers that said Lamar acted upon his own judgment and responsibility in his transactions as such guardian.

Defendant admits that the contents of the will of said Ann C. Sims are substantially as alleged in the bill of complaint herein, but for greater certainty defendant craves leave to refer to said will, or a duly exemplified copy thereof, when the same shall be produced.

Defendant admits that said will was first duly admitted to probate in Montgomery County, Alabama, and thereafter admitted to probate by the surrogate of New York County; that said Benjamin H. Micou re-

nounced the executorship thereof; that defendant was thereupon appointed, and has duly qualified as administrator, with the will annexed; and that there are no just debts of said Ann C. Sims remaining unpaid, to any considerable amount, so far as defendant is informed, although the period for the presentation of claims has not expired and the estate remains unadministered.

Defendant denies that by reason of said will of Ann C. Sims, defendant is now entitled to receive for her own benefit and as her own property, whatever may be recovered in said suit, but alleges that she is entitled to recover the same in her representative capacity as such administrator, and not otherwise, although defendant admits that it appears probable at present that she personally will be entitled, upon the final settlement of her accounts as such administrator, to the amount recovered in said suit, or some part thereof. And defendant denies that she, as the natural guardian of said Ann C. Sims, or otherwise, has approved and ratified the acts of Gazaway B. Lamar as such guardian, or any of them, or that she is thereby, or for any cause, estopped from avering that they were not in every respect right, proper, and legal; and
82 defendant denies that she is not entitled to recover in said original suit, but on the contrary alleges that she is entitled to the relief prayed for in the said original bill of complaint.

Defendant admits that the complainant, under the circumstances, is unable to plead said alleged estoppel in issue or as a bar to said suit.

Defendant denies that any matters alleged in said bill of complaint are contrary to equity or good conscience, or tend to the injury or oppression of complainant.

And this defendant, further answering, denies that the said complainant is entitled to the relief in the said bill of complaint demanded; and this defendant prays the same advantage of her aforesaid answer as if she had pleaded or demurred. And this defendant prays leave to be dismissed, with her reasonable costs and charges in this behalf most wrongfully sustained.

M. J. C. MICOU.

NASH & HOLT,
Defendant's Solicitors and of Counsel,
No. 50 Wall street, N. Y.

UNITED STATES OF AMERICA,
Middle District of Alabama, ss:

Mary J. C. Micou, being duly sworn, deposes and says: that she is the defendant named in the foregoing answer subscribed by her; that she has read the same and knows the contents thereof, and the same is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she verily believes it to be true.

Subscribed and sworn to before me this 26th day of October, 1878.

[L. S.] J. W. DIMMICK.
United States Circuit Court Commissioner
for said District, and Clerk of the U. S.
Circuit Court in and for said district.

83 Circuit court of the United States, southern district of New York, in equity.

G. DE ROSSET LAMAR, AS EX'R,
vs.
MARY J. C. MICOU, AS ADM'X, WITH THE WILL annexed, of Ann C. Sims.

The replication of the claimant to the answer of the defendant:

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly pray as in and by his said bill he has already prayed.

Dated October 30, 1878.

DICKERSON, BEAMAN & DICKERSON,
Complainant's Solicitors.

84 United States circuit court, southern district of New York.

MARY J. C. MICOU, ADMIN'X, WITH THE WILL annexed, of Ann C. Sims,
vs.
C. DE ROSSETT LAMAR, EXEC'R &C., OF GAZAWAY B. Lamar.

CHOATE, J.:

This is a suit brought by the plainttff's testatrix, Ann C. Sims, in the supreme court of the State of New York, against the defendant, as executor of Gazaway B. Lamar. The case was removed into this court by the defendant, and, the plaintiff having died, the suit was revived in the name of the present plaintiff, her administratrix.

The complainant alleges that, on the 21st day of December, 1855, the defendant's testator, Gazaway B. Lamar, was duly appointed by the surrogate of Richmond County, guardian of the said Ann C. Sims, then an infant of about four years of age, and then residing in said
85 county of Richmond; that he accepted said trust and gave bond as required by law; that, on or about January 1st, 1856, he took into his possession all the property of said infant, being more than $5,000 in cash and other property; that he never, during his life-time, rendered an account of said guardianship to the surrogate of Richmond County, or to any court having cognizance thereof, or to the plaintiff; and that the said infant has become of full age, and has demanded an account, which the said guardian and his executor have neglected to give. The prayer of the complainant is for an account and payment of the balance found due.

The answer of the defendant avers that the said Gazaway B. Lamar was a citizen of Georgia, and said infant was a citizen of Alabama,

having a temporary residence in the city of New York when the said Lamar was appointed guardian of said infant, as alleged in the complaint; that in the year 1861 the States of Georgia and Alabama
86 declared themselves to have seceded from the United States and to constitute members of the so-called Confederate States of America, whereupon a state of war arose between the United States and the Confederate States which continued to be flagrant for more than four years after the spring of 1861; that the said Lamar and Ann C. Sims were, in the spring of 1861, citizens and residents of Georgia and Alabama respectively, and citizens of the Confederate States, and were engaged in aiding and abetting the State of Georgia and the Confederate States in their rebellion against the United States, and so continued till January, 1865; that the United States, by various public acts, declared all the estate and property of the said Lamar and the said Ann C. Sims to be liable to seizure and confiscation, and they were outlawed and debarred of any access to any court of the United States, whereby it was impossible for the said Lamar to appear in the surrogate's court of Richmond County to settle and close his ac-
87 counts there and to be discharged of his liability as guardian, in consequence whereof the relation of guardian and ward ceased and determined so far as the same depended upon the order or decree of said surrogate's court; that for the purpose of saving the money and property of said Ann C. Sims, from seizure and confiscation by the United States, the said Lamar, at the request of said Ann C. Sims and of her natural guardians, all citizens of Alabama, withdrew the funds belonging to her from the city of New York, where they were declared to be forfeited and confiscated, and invested the same for her benefit and account in such securities as by the laws of Alabama and Georgia and of the Confederate States he might lawfully do; that on the 15th day of March, 1867, at the written request of said Ann C. Sims and of her natural guardians, one Benjamin H. Micou was appointed her legal guardian by the probate court of Montgomery County, in the
88 State of Alabama, where she then resided; that said Lamar accounted with and paid over to said Micou, as guardian all the estate with which he was chargeable as guardian, and received from said Micou as guardian a full release therefor, and that the said Ann C. Sims ratified and confirmed the same when she became of age.

A similar suit was brought by Ann C. Sims as administratrix of Martha M. Sims, her sister, of whom the said Lamar was at the same time appointed guardian. Martha M. Sims died in 1864, at the age of fifteen years, unmarried and intestate, leaving the said Ann C. Sims her next of kin. The complaint in such second suit states a cause of action similar to that stated in the suit of Ann C. Sims. The answer in this case states the same defences of the dissolution of the relation of guardian and ward, by the war; the withdrawal of the funds to save them from confiscation. It also avers that all the rights of
89 Martha M. Sims vested at her death in Ann C. Sims, and that the settlement with Micou as guardian and his release discharged the said Lamar from all liability as guardian of Martha M. Sims.

After the revival of these suits in the name of the present plaintiff, cross suits were commenced in this court by the defendant against the present plaintiff, setting up the same defences as in his answers to the original complaints, and further averring that the present plaintiff is the sole legatee under the will of Ann C. Sims, and entitled to receive in her own right whatever shall be recovered in these actions, and that

the present plaintiff, as one of the natural guardians of said infants, approved and ratified all the acts of said Lamar as their guardian, and is therefore estopped to deny that those acts were in all respects legal and proper. The present plaintiff in her answers in the cross-
90 suits denies that she was one of the natural guardians of said infants, and denies the approval and ratifications of the acts of the guardian.

The four suits have been tried together upon an agreed statement of facts.

The appointment of defendant's testator as guardian of the two infants by the proper court of the place of their domicile, at the time of the appointment, and his receipt soon afterwards of moneys belonging to his wards, are admitted. The condition of his bond, which is made a part of the complaint is, that he "will faithfully in all things discharge the duty of a guardian according to law, and render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship, in all respects, to any court having cognizance thereof, when thereunto required." The letters of guardianship appoint him "the general guardian of the person and estate of said minor until she shall arrive at the age of fourteen
91 years, and until another guardian shall be appointed," and requires him "to safely keep the real and personal estate of said minor, and not to suffer any waste, sale, or destruction of the same, &c., and to deliver the same to her when she becomes of full age, or to such other guardian as may be hereafter appointed; in as good order and condition as when received, and also to render a just and true account, &c., in any court having cognizance thereof, when required."

The court to which the ward resorted for an account and relief was a court of general equity jurisdiction, and therefore a court having cognizance thereof, and the causes of action alleged in thes' complaints are fully sustained by these admitted facts, unless the matters alleged in the answers are, if sustained by the evidence, valid defences to the guardian.

(1.) The first ground of defense insisted on is that by the war
92 the relation of guardian and ward was terminated, and hence it is argued that though the former guardian continued to hold upon some kind of a trust the assets which he had received as guardian, yet he no longer held them as guardian under and according to the laws of New York; that the guardian and ward having both acquired new domiciles out of this State and within the territory of what became, at least pending the war, an alien and a hostile State, this personal domestic relation was thereby wholly broken, and did not revive when the war ceased, and the guardian was no longer accountable to the courts of New York as guardian, even after the close of the war. I can see no ground whatever for this position, so far as concerns the care and safe-keeping of the property of the ward in the hands of the guardian, and his liability to account for it after the war was over.

Doubtless during the war, if the guardian had remained here,
93 and his ward had become an alien enemy, his duties as guardian would be modified by that fact. He could not properly or legally remit funds for her support to any person in the hostile territory. But he would still be under the same obligation as before as to the safe-keeping of the property, and whenever the ward ceased to be alien enemy by the termination of the war, there was no legal obstacle to her calling the guardian to an account for the property so held. Even if the war dissolved the relation, the effect of such dissolution would not be greater than

would be that of the termination of the guardianship by the death of the ward, and if the ward had died before the war begun, the guardian must still account to her legal representative. If he ceased to be guardian, he still remained a trustee of the property upon precisely the same trusts as to its safe-keeping, and under the same liability to account
94 for it according to the tenor of his appointment and bond as before. The case of a copartnership between citizens of hostile States being dissolved by war, is cited as controlling this case. If it were wholly analogous, which it does not seem to be, I do not perceive that it would touch the present question. By the acceptance of his appointment and his bond, the defendant's testator undertook and agreed to do certain definite things with the funds he received—to keep them invested in a certain way which the law prescribes, and to account for them when required. It is alleged that he has failed to do so. It certainly is no answer for him to say that of his own free will he made himself an alien enemy of the State of New York and of the United States, and thereby discharged himself from the obligation thus assumed under the laws of New York. Yet, this is what this defense amounts to, so
95 far as it rests on his becoming a resident of Georgia, and as such engaging in the war against the United States. So far as this defense rests on the ward's "being an alien enemy," her right to call him to account in respect to the funds received by him as guardian before the war, was suspended, not annulled, by the war. In Insurance Co. v. Davis, 95 U. S., 430, the Supreme Court say: "If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close." If this is so of an agent, it must certainly be said with equal force of a guardian, that good faith and fidelity to his trust will require him to keep his ward's money and its accumulations safely during the war, and to account for it at its close. Nor can the guardian better his position in this respect,
96 by himself voluntarily going into rebellion, as this guardian went from New York to Georgia to join in a rebellion, for he could not by any act of his own, short of the complete discharge of his duty, relieve himself from his liability.

2. The next defense urged is, that the guardian, to prevent the confiscation of the ward's money, withdrew it from its investment in bank-stock in New York and sent it to Montreal, Canada, where it remained invested, by his direction, in the bonds of cities within the rebel States, and in Southern railroads. This point is clearly untenable. It is not contended that the new investments made were such as a guardian is allowed to make according to the laws of New York, and they were obviously extra-hazardous. They are not to be justified on the plea that if the funds had remained here, invested according to law, they would be liable to be confiscated by the United States. It is no part of the duty of a guardian to protect his ward's money against the law-
97 ful demands of his own government. If, under such lawful demands they are seized, the guardian would no longer be responsible for them. His duty as a citizen to interpose no obstruction to the efforts of his own government in carrying on war, is his first duty. It is superior to any obligation he owes to his ward. If his ward's money was forfeited to the United States, he had no right nor duty to prevent by its removal the superior rights of the government over it from being asserted. Moreover, the proofs show that what he did was under color of protecting his ward's interests to allow the funds to be loaned to cities and other corporations which were aiding in the rebellion, and

by this very act, set up in excuse, he gave aid and comfort to the enemies of his government. Such an act could not be pleaded in justification, because in itself unlawful, even if the circumstances warranted a removal of the fund to avoid confiscation, which clearly they did not.

98 3. Another ground of defense set up is the transfer of what remained of the fund in 1867 to a new guardian in Alabama and his alleged release of defendant's testator.

At the time of the appointment of Mr. Micou guardian by the Alabama court, the infant Ann C. Sims was domiciled in that State. The appointment was made upon her written request, and as it appears by the statutes of Alabama put in evidence, it was in all respects in conformity with those statutes and by a court of competent jurisdiction. It is objected on the part of the plaintiff that a new guardian cannot be appointed till the former guardian is removed or superseded. This may be the rule where both guardians are appointed within the same jurisdiction. There seems, however, no legal objection to their being several guardians in several different States, if the infant has property in different States which requires the care of a guardian. The defend-

99 ant's testator was appointed guardian of the person and property of the infants. When they removed from the State of New York, which they did with the relatives with whom they lived in the year 1856, his duty and power as guardian of the person may have ceased or been suspended, at least until they might return, on the ground that his appointment under the laws of New York would give him no power to control their persons beyond the local jurisdiction of those laws. And when the infants became, as they did, domiciled in Alabama, I think the power of the State of Alabama to provide by law for the appointment of a guardian of their persons and of such property as they might have within its jurisdiction cannot be questioned. The fact that there was already a guardian of some of their property in another State or country, is not inconsistent with the exercise of this power. And it would certainly be most proper, and in many cases conven-

100 ient and for the true interest of the infant that in case of a change in domicile, a new guardian should be appointed within the new jurisdiction. And a transfer of funds from a former guardian to the new guardian appointed in the State of the infants' domicile might also be very properly authorized by the court to which the former guardian is accountable, upon the same principles of equity and comity on which the transfer of funds in the hands of an executor or administrator, to an executor or administrator in another State may be authorized (Parsons v. Lyman, 20 N. Y., 103). In the present case the former guardian, Mr. Lamar, requested of the near relatives of the infant the appointment of a new guardian. His reasons were his age and growing infirmities and his own business cares and perplexities. And the appointment was asked for and made in accordance with this request. The reasons were

101 valid and sufficient, and the circumstances made it proper that the new guardian should be appointed in Alabama, and I cannot doubt that if the defendant's testator had applied to the surrogate's court of Richmond County for leave to resign his trust and to transfer the ward's estate to the duly appointed guardian in Alabama, his petition would have been granted. What would thus have been approved as just and right if asked for can now be justified as done for the benefit of his ward. Therefore, in any accounting to be had, the defendant's testator should be credited with his cash payment to the new guardian of $808.70. But beyond this the transaction referred to as a settlement with, and

release of, the defendant's testator by, the new guardian neither purported to be, nor could if so understood and intended by the parties be, a release of the former guardian from his liability to account for the residue of the infant's estate with which he was chargeable

102 The new trustee merely gave a receipt for sundry securities, mostly worthless, which the defendant's testator turned over to him. They were the remains of the investments which had been made of the ward's property; but the original investments being in bank stock, had been not such as the ward was, when of age, *was* bound to accept; and by the changes of value effected by the war, and by the investments made in consequence of the war, and during the war, the result was that the rest of the fund consisted of bonds of Southern cities and Southern railroads of little value. It is too plain for argument, it seems to me, that a new guardian has no power to accept a transfer of such properties as a full discharge of the former guardian's liability to account for and make good the monies originally received. Such an act would be a gross abuse of his trust by the new guardian. No court would authorize or justify it; and certainly a guardian

103 has no power, by virtue of his appointment, thus to give away the property and rights of his ward. If the new guardian has actually realized anything from the securities transferred, I see no reason why, in the taking of the account, defendant's testator should not be credited with it.

4. The defense of a ratification by the ward is not made out by the evidence. Such a ratification must be very clearly proved, and it must appear that it was made with full knowledge of all the facts, and a full understanding of the legal rights of the ward affected thereby (Adair v. Brenner; 74 N. Y., 539, 554.) Neither of these circumstances is shown in this case. It is true that Ann C. Sims, in 1867, made a written request for the appointment of a guardian in Alabama in place of her former guardian. She was then about sixteen years old. She became of age, June 1, 1872, and commenced this suit July 1, 1875.

104 She was not shown to have meanwhile done any act waiving her claim. It is true that her uncle and aunt Micou, with whom she lived, had written letters expressive of their gratitude to the defendant's testator for doing as well by their niece as he had done; but those letters do not bind the ward, and if they did, they are not shown to have been written with a full knowledge of the ward's rights.

5. The additional defense set up in the cross-suits is also untenable. Mrs. Micou, the present plaintiff, at the time the alleged acts of approval by her were done, did not stand in the relation of a natural guardian to the infants, having any power as such over their estate. She was their aunt, and after the death of Martha M. Sims she was one of the next of kin of the surviving infant Ann C. Sims. A guardian upon whom the law throws the real responsibility for the proper and legal investment of his ward's money cannot relieve himself from that responsi-

105 bility by pleading the advice, direction, or approval of his ward's relatives, however near. And Mrs. Micou, before the death of Ann C. Sims had no such interest in her estate as would make her admissions and acts binding on her when afterwards she became the administratrix of Ann C. Sims. Nor is the evidence of ratification and approval satisfactory, even in respect to the present plaintiff, for the reasons above stated.

6. Although the defendant's testator acted without any other real purpose, as it seems, than to do what he thought for the best interest of his ward, yet he took the risk of investing the funds in a manner not

allowed by law, and he must therefore make good the amount received, with interest and annual rests (King v. Talbot, 40 N. Y., 76). The fact that down to the time of the war there had been no depreciation in fact is immaterial. The ward may now elect to reject the invest-
106 ments altogether. The guardian is to be allowed all payments made by him for the support and education of the infants as the same appear on his accounts rendered, which are admitted to be in that respect correct.

7. The defendant's testator received for his wards from time to time a certain proportionate part of the dividends on stock of the Mechanics' Bank, a Georgia corporation. The plaintiff insists that the defendant's testator should be charged with the infants' proportionate part of the value of this stock. The evidence is not sufficient to show what interest, if any, the infants had in this stock, or whether the defendant's testator could, by appropriate proceedings in the courts of Georgia for ancillary letters of guardianship or otherwise, have obtained possession as guardian of this interest. If he could have done so, it seems that it would have been his duty to do it, (Schultz v. Pulver, 11 Wend.,
107 361). But this question will more properly arise when an account shall have been taken and the facts are all before the court.

There must be decrees for an account in the original suits, and dismissing the bills in the cross-suits with costs.

S. P. Nash and G. C. Holt for plaintiffs.
E. N. Dickerson and C. C. Beaman for def'ts.
December 31st, 1879.

(Endorsed:) U. S. circuit court, south'n dist. of New York. Mary J. C. Micou, admin'x., vs. C. De Rossett Lamar, ex'r., &c. (Copy.) Decision. Dec. 31st, 1879. Choate J. (Original.) Filed January 2, 1880.

108 (Indorsed:) U. S. cir. court. Micou vs. Lamar. (Copy.) Decision. Choate, J. Filed Jan'y 2, 1880.

109 At a stated term of the circuit court of the United States, for the southern district of New York, held at the United States court-rooms, in the city of New York, in the said district, on day of January, 1880.

Present, Hon. William G. Choate, judge.

MARY J. C. MICOU, AS ADMINISTRATRIX WITH the will annexed of the goods, chattels, and credits which were of Ann C. Sims, deceased, complainant,
vs.
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased, defendant.
} In equity.

This cause came on to be heard on December 1st, 1879, and after hearing George C. Holt, esq., and S. P. Nash, esq., of counsel for
110 complainant, and E. N. Dickerson, esq., and Charles C. Beaman, esq., of counsel for defendant, and due consideration having been had—

Now on motion of Nash & Holt, complainant's solicitors, it is ordered that it be referred to James H. Gilbert, esq., a commissioner of this court, as master, to take an account of the estate of Ann C. Sims,

which came to the hands of Gazaway B. Lamar, as her guardian, as in the bill of complaint stated, on which, without his default, might have so come to his hands.

And it is further ordered that the investments, appearing by the accounts presented as part of the proofs herein, to have been made by the said Gazaway B. Lamar of the moneys of the said Ann C. Sims in stock of the Bank of the Republic and of the Bank of Commerce of Savannah, and the subsequent reinvestment of the proceeds of said stocks were, in respect to the said Ann C. Sims, a breach of trust on the part of said Gazaway B. Lamar, and that he is to be charged in account with the principal moneys, as of the date when first received, with interest thereon as hereinafter directed, without reference
111 to said investments. That the said master inquire and report what interest, if any, the said Ann C. Sims had in certain stock, dividends on which are entered in his accounts, of the Mechanics' Bank of Augusta, Georgia, at the time of the appointment of said Gazaway B. Lamar as guardian, and also in certain shares of the stock of the Bank of Commerce, of Savannah, standing in the name of her mother at the time of her death, and whether the said Lamar might, by due diligence, have collected her said interest; and, if so, that the master charge the said Gazaway B. Lamar in account with the market value of such interest at the time when he shall find that, according to the course of proceedings in the court of Georgia, he might, with reasonable diligence, have collected the same.

It is further ordered that, in stating said account the master credit the said Gazaway B. Lamar with the moneys paid out for the use and benefit of the said Ann C. Sims (other than the investments and reinvestments above-mentioned), and also with the sum of $808.70
112 paid over by the said Gazaway B. Lamar, on or about the 24th of May, 1867, to Benjamin H. Micou, as guardian of the said Ann C. Sims, appointed by the probate court of Montgomery County, Alabama.

And it is further ordered that the said Gazaway B. Lamar is not entitled to be credited with the full nominal or par value of the following securities delivered at the same time to the said Micou, to wit: One bond, No. 17, for $1,000 of the East Tennessee and Georgia Railroad and the coupons thereof; one bond, No. 631, of the city of Mobile; two bonds, Nos. 3909 and 3910, of the city of New Orleans, with the coupons thereon; three bonds of the city of Memphis, Nos. 1096, 1126, and 1488, with the coupons thereon, nor for any of the bonds of the Confederate States fifteen million loan, nor for the 90 shares of the stock of the Bank of Commerce, certificate No. 133, nor for the four bonds of $100 each of the City of Memphis, Nos. 36, 43, 101, and 109. But the master is directed to inquire and report whether the said Benjamin H. Micou has realized anything; and, if so, how much from the said securities
113 or any of them, or if he has not realized anything therefron, how much he might have realized when so delivered to him, and to credit the said Gazaway B. Lamar in account with such amount as may or might have been so realized.

And it is further ordered that the said account be taken with annual rests with interest at five per cent. per annum; that is to say that interest be charged upon the balance of money considered as uninvested in the hands of the testator on the first day of January, 1857, and added to the principal on the first day of January, 1858, and that on each succeeding first of January thereafter, the interest on the balance of the previous first of January be added in like manner.

And it is further ordered that the said master inquire & report what disposition the said Micou has made of the securities delivered to him above referred, and also the highest value of said securities at any time since they were delivered to him, and upon the coming in of the report the said Gazaway B. Lamar may, upon the proofs so to
114 be taken, make such application as he shall be advised for a further credit by reason of the delivery of said securities to said Micou, and let all other questions in the cause be reserved until the coming in of the report of said master.

WM. G. CHOATE.

The settlement of the within decree is hereby adjourned to January 31, 1880, at same hour and place. Dated N. Y., January 24, 1880.

DICKERSON & BEAMAN,
Sol'rs for Def't.

(Endorsed:) U. S. circuit court, southern district of New York. Mary J. C. Micou, adm'x, &c., vs. G. De Rosset Lamar, ex'r, &c. Interlocutory decree. Nash & Holt, sol'rs for compl't, 50 Wall st.

To Messrs. DICKERSON & BEAMAN, *Def't's Sol'rs:*

SIRS: Take notice that we shall present the within decree for settlement to the Hon. Wm. G. Choate, at the U. S. dist. court-room, on Saturday, January 24, 1880, at 11 a. m., or as soon thereafter as counsel can be heard.

Dated January 22, 1880.

Yours, &c.,

NASH & HOLT,
Sol'rs for Compl't, 50 Wall st.

U. S. circuit court. Filed Febr'y 9th, 1880. John I. Davenport, clerk. Due service of a copy of the within proposed decree and notice of settlement thereof is admitted this 22 day of Jan'ry, 1880.

DICKERSON & BEAMAN,
Def't's Sol'rs.

115 At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court-rooms, in the city of New York, in the said district, on the day of January, 1880.

Present, Hon. William G. Choate, judge.

G. DE ROSSET LAMAR, AS EXECUTOR OF THE will of Gazaway B. Lamar, deceased, complainant, *vs.* MARY J. C. MICOU, AS ADMINISTRATRIX, with the will annexed, of Ann C. Sims, deceased, defendant.	In equity.

This cause came on to be heard on December 1, 1879, and after hearing E. N. Dickerson, esq., and Charles C. Beaman, esq., of counsel for complainant, and S. P. Nash, esq., and George C. Holt, esq., of counsel for defendant, and due consideration having been had, now, on
116 motion of Messrs. Nash & Holt, defendant's solicitors, it is or-

dered, adjudged, and decreed that the complainant's bill of complaint be, and hereby is, dismissed upon the merits, with costs to be taxed by the clerk of this court, and to be paid by the complainant, out of the said estate of Gazaway B. Lamar, deceased, to the defendant.

WM. G. CHOATE.

The settlement of the within decree is hereby adjourned to January 31st, 1880, at same hour and place.

Dated N. Y., January 24, 1880.

DICKERSON & BEAMAN,
Sol'rs for Pl'ff.

(Endorsed:) U. S. circuit court, southern dist. of New York. G. De Rosset Lamar, ex'r, &c., vs. Mary J. C. Micou, adm'x, &c. Decree dismissing bill of complainant. Nash & Holt, def't's sol'rs, 50 Wall st.

117

To Messrs. DICKERSON & BEAMAN, *Compl't's Sol'rs:*

SIRS: Take notice that we shall present the within decree for settlement to the Hon. Wm. G. Choate, at the U. S. dist. court-room, on Saturday, January 24, 1880, at 11 a. m., or as soon thereafter as counsel can be heard.

Dated January 22d, 1880.

Yours, &c.,

NASH & HOLT,
Def't's Sol'rs, 50 Wall st.

Due service of a copy of the within proposed decree and notice of settlement thereof is admitted this 22d day of January, 1880.

DICKERSON & BEAMAN,
Def't's Sol'rs.

U. S. circuit court. Filed Feb. 9, 1880. John I. Davenport, clerk.

118 U. S. circuit court, south. dist. of N. Y.

MARY J. C. MICOU, &c.,
vs.
G. DE ROSSET LAMAR, &c., &c. } 2 cases.

NEW YORK, *Sept. 16th*, 1880.

Proceedings on reference before James H. Gilbert, master, at his office, No. 37 Wall street, in the city of New York.

Mr. Holt appears for pl'ff.
Mr. Beaman appears for def't.

The object of the reference having been stated by counsel, Mr. John E. Ward, having been called as a witness on behalf of plaintiff, and being duly sworn, testified as follows:

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

119 Be it remembered that on this sixteenth day of September, in the year of our Lord one thousand eight hundred and eighty, I,

James H. Gilbert, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of section 627 of the Revised Statutes of the United States, did call and cause to be and personally appear before me, at my office, at No. 52 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, John E. Ward, to testify and the truth to say on the part and behalf of the plaintiff in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at the city of New York, wherein Mary J. C. Micou, as administratrix, &c., is plaintiff, and G. De Rosset Lamar, executor, &c., is defendant.

And the said JOHN E. WARD, being about the age of sixty-
120 five years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said John E. Ward, and he did thereupon depose, testify, and say as follows, viz:

I reside in New York; my business is that of an attorney and counsellor at law. I have been in the practice of the law since 1835; was admitted by special act of the legislature. I formerly resided in Savannah, Georgia, and practiced law there from 1835 until lat'er part of 1865. I was familiar with the law of Georgia during that period.

Q. Suppose the following case: In December, 1855, a gentleman then residing at Brooklyn, New York, was duly appointed by the surrogate of Richmond County, New York, guardian of the persons and estates of two little girls, one four and the other six years of age. Their father had died in 1850 intestate, leaving a widow and the said two
121 daughters, his only next of kin. The widow married again in 1853, and at the time of the guardian's appointment she was living, with her husband and her two daughters by her first husband, in Richmond County, New York. A few months after the guardian's appointment they removed to Hartford, Connecticut, and resided there until the death of the mother of said wards, in the spring of 1859. Thereupon the said wards removed to Augusta, Georgia, and resided with their grandmother there until January, 1860, when they removed to Montgomery, Ala., where they resided through the war. The guardian, between the time of his appointment and the outbreak of the war, resided partly in Georgia and partly in New York. The father of these wards owned at the time of his death ten shares of the stock or the Mechanics' Bank of Augusta, Georgia, which thereupon passed to his said widow as administratrix of his estate; at the time the said guardian was appointed said stock stood on the books
122 of the bank in her name as such administratrix. On or about January 30, 1856, the said guardian collected certain dividends on said stock from said bank and credited each of his wards on their account with one-third the amount so collected, but the bank refused to transfer the stock held in the name of said widow as administratrix. Thenceforward the guardian collected the dividends regularly upon said stock and gave credit to each of his said wards on their accounts for one-third thereof until the death of their mother, in 1859. She died intestate, leaving surviving her second husband and her said two daughters, her only next of kin. After her death her said second husband formally transferred to the said guardian for said infants all his interest in any property derived from his wife. From the death of this lady, in the spring of 1859, until the outbreak of the war, said guard-

ian continued to regularly collect the dividends on said stock
123 and to credit each of said wards on their account with one-half thereof. About 1865 the said bank became insolvent, and said stock became and has since been worthless. The said guardian has never accounted for the principal of said stock, and there is no evidence that he ever requested the mother of his wards to transfer, as such administratrix, her daughters' interest therein to him as their guardian, nor that he ever took any legal proceedings to cause their interest to be transferred to him as their guardian, or to convert such property into cash and to invest it in a manner authorized by the laws of New York. Was the law of Georgia such, during the period between the guardian's appointment and the outbreak of the war, that the guardian could have got possession of his wards' interest in this stock, converted it into cash, and removed it from the State?

(Defendant's counsel objects to the question as incompetent and not relating to the subject.)

124 A. A foreign guardian of a ward, residing out of the State of Georgia, but having property in the State of Georgia, may obtain possession of the property so as to remove it out of the State of Georgia by giving an additional bond in the State where he has taken out his letters of guardianship in double the amount of the value of the property in Georgia, and taking to the court of ordinary in Georgia, that court having jurisdiction of such causes, a certificate from the court granting the letters of guardianship, and applying to the court of ordinary for leave to sell and remove the property. It is a matter of discretion with the court of ordinary to grant or refuse such leave.

Sec. 1867 of Irving's Revised Code, which on this subject is the law from 1855 to 1873.

(Plaintiff's counsel offers in evidence sections 1865 to 1869, inclusive, of Irving's Revised Code.)

125 Q. Assuming that the distribution of said bank stock would be governed by the law of Georgia, what would be the interest of each ward and of the widow in it before the widow's death, and what of each ward, after their mother's death and her husband's transfer of his interest therein to the guardian?

A. Each child during the mother's life would have taken one-third, and after their mother's death, they would be entitled to one-half.

(Plaintiff's counsel offers in evidence article I, sec's 2 & 3, of Irving's Revised Code.)

Q. Suppose that the mother of said wards owned at the time of her death, nine shares of the Bank of Commerce of Savannah, Georgia, holding a certificate of such ownership in her own name, and that thereupon her husband transferred all his interest therein, derived through his wife, to said guardian, and delivered said certificate to him. Was the law of Georgia such, during the period between
126 the spring of 1859 and the outbreak of the war, that the guardian could have got possession of his wards' interest in this stock, converted it into cash, and removed it from the State?

A. Only by taking out letters of administration on the estate of their mother. He could have taken out letters only if he was a resident of Georgia.

Q. Can a foreign guardian bring a suit in Georgia?

A. Not directly by the statute, but inferentially. Sec. 12, page 456, refers to foreign executors and administrators. The note on page 323 asks: "Does not sec. 2618 apply to foreign guardians?" The term guardian is found in the statute from which this act is derived.

NEW YORK, *September* 17, 1880.

Q. There is no doubt of the power of a foreign administrator or executor to maintain an action in Georgia?

127 A. None at all, provided he complies with the rules.

Q. And there is no doubt that a negotiation or settlement made with a foreign administrator by a person in Georgia would be binding without any litigation?

A. I think that would necessarily follow.

Q. In your opinion, in the case of the Mechanic's Bank stock, at what time after the guardian's appointment, and in the case of the widow's share of the Mechanics' Bank stock and of the Bank of Commerce stock, at what time after her death, could the guardian with reasonable diligence, have collected the interest of his said wards in said property so as to be able to invest the proceeds in conformity with the rules of law in New York in regard to the investment of trust estates? (Objected to as incompetent.)

A. In my judgment, assuming that the Mechanics' Bank stock is the stock where the children had the two-thirds interest, where he

128 was the guardian in that case, I think that from 30 to 60 days would be sufficient.

Q. In the case of the other?

A. In the case of the other he could not have got control of that until he got the legal title to it; he could not have got the legal title to it except as administrator upon the estate—through the deed of the husband—through the conveyance of the husband; the husband in Georgia is the heir of the wife; the property of the wife goes to the husband, and the husband can take possession even without administering it; if the husband convey it away to any one else, that person would necessarily have to administer upon the estate; the husband can only get possession of it without administering by paying all the debts.

Q. Suppose that the guardian to whom I have referred in previous questions resided a part of this period in Georgia, would there be any difficulty then in his taking out letters administering?

129 A. None at all while he resided there; if the husband was willing that he should.

Q. Did you know Mr. Gazaway B. Lamar in his lifetime?

A. Yes, sir.

Q. Do you know of his being in the State of Georgia during this period?

A. I know of his being there after 1861.

Q. Previous to that?

A. I know he was a Georgian and came from there to New York. I did not know of his subsequent residence there until after 1861. I was absent from the State from January, 1859, until April, 1861.

Cross-examination by Mr. BEAMAN:

Q. Under the laws of Georgia, during the period in question, in case of the death of a husband, who had the right to administer on his property if he left a widow?

A. His widow.

Q. In preference to all other persons?

A. In preference to all other persons.

Q. What share would the widow take, and what share the two children, in the husband's personal property, if there was no will?

130 A. The widow would take a child's portion, unless there were

over five children, in which case she would take one-third; in this case she would take one-third.

Q. Would the children be entitled to any sum of money from the administratrix until the settlement of the estate and the payment of the debts of the deceased husband?

A. None at all, except what we call family support; there is a law which provides that there can be an allowance for support.

Q. In such a case the allowance for support would be to the mother?

A. Yes, sir; the allowance would be to the mother.

Q. By the laws of Georgia, until an estate is settled, there is no possible way, is there, of knowing the exact amount to which, in the case in question, the widow and the two children would be entitled?

A. The debts must first be paid.

Q. And until the estate was settled no sum of money could be claimed by the children or by any one representing them?

A. That would depend upon the time that is taken to settle the estate; a year is given before any suit can be brought after the
131 qualification of the administrator; if there are no debts intervening during that year the administrator may be compelled after the expiration of that time to settle the estate.

Q. But, in the case in question, the guardian, even if he had been a resident of Georgia and guardian there, could not have obtained anything from the wife as administratrix until the estate had been settled or until a reasonable time had elapsed?

A. He could apply at any time to the ordinary to have the estate distributed; the defense would be that the estate had not been settled, or that there were debts to be paid.

Q. If, in the case in question, the guardian was a foreign guardian, he would not recover any property for the ward in Georgia unless by the process you have already indicated?

A. I think not.

Q. And on any attempt to so take property from the State of Georgia the matter would be altogether left, would it not, to the discretion of the ordinary?

A. Entirely so.

Q. And before exercising that discretion he would have to
132 give notice in the case in question to the parties particularly interested, say the mother of the children, and perhaps to the children themselves, if they lived in Georgia?

A. He would have to give notice to all parties interested, the foreign guardian making the application.

Q. Did you ever know of a case in Georgia where a foreign guardian removed property from the State when the wards and their mother lived in the State?

A. No.

Q. After the death of the lady in question, Mrs. Abercrombie, if she left a husband surviving, who would have the right to administer upon her estate?

A. The husband.

Q. In preference to everybody else?

A. In preference to everybody else.

Q. Until her estate was administered, could the guardian of her children recover any part of it for themselves?

A. I think not.

Q. Suppose Mrs. Abercrombie to have died leaving a husband

133 and two children, how would her property have been distributed, by the laws of Georgia?

A. It would go to the husband.

Q. All of it?

A. Yes, sir; provided there were no trusts and the property was legally hers.

Q. If the husband in such case made a transfer of such property to take effect at his death, would such assignment, under the laws of Georgia, take effect before his death?

A. I think not.

Q. Did you ever know a suit in Georgia to be maintained by a foreign guardian?

A. At present I have no recollection.

Q. As a lawyer skilled in the knowledge of the laws of Georgia, would you presume that if there was a special statute authorizing foreign administrators and executors to sue in Georgia that it did not include guardians?

A. It would depend very much, I think, upon the wording of the statute.

Q. During the period in question, say from 1855 to 1867, what
134 were the laws of Georgia with reference to investments by guardians in behalf of their wards?

(Objected to as immaterial.)

A. Guardians exercised a great deal of discretion, and in the exercise of that discretion they were very much protected by the courts. My recollection upon that point is that the law of Georgia pointed out certain things—the bonds of the State for instance, that they could invest in, freeing them from all liability if the guardian chose to invest in anything else, except what the law particularly prescribed; he took the responsibility upon himself, and when the ward became of age he could repudiate it; I have known of such suits as that, suits brought by the ward to make the guardian pay back the money, on the ground that it was not a judicious investment; there were certain prescribed things which executors and administrators were authorized to invest in.

Q. In other cases it was a question which the courts passed upon in each particular case in view of the facts?

A. Yes, sir.

135 Q. Was there a general statute upon it?

A. There was a general statute.

Q. You are familiar with the laws of Georgia from 1861 to 1865?

A. Yes, sir.

Q. What laws were enacted during that period in reference to the investment by guardians or trustees of trust-funds, so far as such investment related to investment in so-called Confederate State bonds?

A. They were authorized to be invested in Confederate bonds; an act was passed by the State of Georgia authorizing the investment in Confederate bonds.

Q. And that act freed the guardian, did it not, from liability if he made such investment, so far as it could do so?

(Objected to.)

A. It did.

Q. The statute that you have referred to with reference to removal of property from the State, does not apply, does it, to property of an infant residing in the State.?

A. I do not think it does; it speaks of infants out of the State.

Q. Could property of infants residing in the State have been removed from the State by a foreign guardian?

136 A. I know of no statute authorizing it?

Q. Do you know of any case or practice authorizing it.

A. I do not.

Q. Could a non-resident, not a wife or husband of the deceased person, obtain letters of administration in the State of Georgia without giving bonds?

A. No, sir; he could not.

Q. In a question of various persons applying to be appointed guardian before the ordinary, would or would not the preference be given to residents, other things being equal?

A. That would be a matter discretionary with the ordinary.

Q. Would or would not preference be given to relatives?

A. It would be a matter purely discretionary with the ordinary.

Redirect-examination by Mr. HOLT:

Q. You say you never knew an instance of property *of property* of an infant residing in the State being delivered to a non-resident guardian?

A. No, sir.

Q. Did the case ever arise within your experience?

A. No, sir.

137 It is stipulated that the signature of the witness to the depositions be waived.

Mr. Holt offers in evidence the case of Sims v. Renwick, reported in 25 Georgia, page 58.

Mr. Holt offers in evidence the stipulation herein as to testimony marked Ex. B.

It is agreed between counsel for the respective parties that either side may refer to any decisions in the reports of the courts of the State of Georgia that refer to any matter herein with the same effect as if the report had been duly offered in evidence.

It is further stipulated that the master may refer to the pleadings and proofs in the cause.

It is further stipulated that all the evidence taken on this ref-

138 erence may be considered as taken and offered in both suits referred to the master.

Reference adjourned to September 22, 1880, at the same time and place.

139 U. S. circuit court, south. dist. of New York.

MARY J. C. MICOU, &C-,
vs.
G. DE ROSSET LAMAR, EX'R, &C.

NEW YORK, *September 22d*, 1880.

Reference proceeds.

Appearance as before.

Mr. Holt rests on behalf of the plaintiff.

Mr. Beaman offers in evidence a stipulation, defendant's stipulation marked Exhibit No. 1.

Also the deposition of Benjamin H. Micou taken upon commission. Received and marked Exhibit No. 2.

Defendant rests.

Reference adjourned by consent to September 23d, 10½ a. m.

N. Y., *September* 23*d*, 1880.

Reference proceeds, & closed.

140 NEW YORK, *December* 9*th*, 1880.

Present, the master and counsel for the respective parties.

The master's report having been prepared and submitted to the counsel with the united account for examination—

Counsel for defendant requests the master to find that the value of the twelve past-due coupons attached to bond #17 of the East Tennessee and Georgia Railroad Co. and of the thirty-six past-due coupons attached to the three bonds #1096, #1126, and #1488 of the city of Memphis was on the 24th day of May, 1867, equal to the percentage value of the face value of the said bonds.

The master declined so to find. The defendant's counsel duly excepted.

Counsel for defendant requests the master to allow the accounting guardian credit for the value of said coupons on the 24th day of May, 1869.

Refused; exception.

Reference closed.

141 (Endorsed:) U. S. circuit court, south. dist. of N. Y. Mary J. C. Micou, as adm'x'r &c., vs. G., De Rosset Lamar, as ex'r, &c. Same vs. same. Proceedings on accounting before James H. Gilbert, master, &c., U. S. circuit court. Filed Dec. 17, 1880. Joseph M. Deuel, clerk.

142 U. S. circuit court, southern district of New York. In equity.

MARY J. C. MICOU, AS ADM'X, &C., OF ANN C. SIMS, DEC'D,
vs.
J. DE ROSSET LAMAR, AS EX'R, &C.

MARY J. C. MICOU, AS ADM'X, &C., OF MARTHA M. SIMS, DEC'D,
vs.
J. DE ROSSET LAMAR, AS EX'R, &C.

In the accounting now pending before James H. Gilbert, esq., master, under interlocutory decrees entered in the above-entitled causes, it is admitted that the defendant could prove the following statement of facts, and that such statement shall be considered as proven by the defendant.

Dated New York, August 16, 1880.

DICKERSON & BEAMAN,
Sol'rs for Def't.
NASH & HOLT,
Sol'rs for Pl'ffs.

143 First. That on the first day of July, in the year 1872, the market value of the bond of the East Tennessee and Georgia Railroad Company, November 17, for $1,000, which had been received by Benjamin H. Micou, as guardian of Ann C. Sims, from G. B. Lamar, was the sum of seven hundred and twenty-five dollars ($725.00).

Second. That said bond number 17 has now a market value equal to its par value.

Third. That the amount of the twelve past-due coupons attached to the said bond No. 17, which on the 24th of May, 1867, were delivered to said guardian with said bond, might have been collected from said railroad company, and said Micou, as guardian as aforesaid, might have realized therefrom on or about the 24th May, 1869, the sum of three hundred and sixty dollars ($360.00).

Fourth. That on the first day of July, 1867, the coupon on said bond falling due on that day, and amounting to thirty dollars, would, if presented, have been paid by said railroad company, and that the similar coupon for every half-year's interest thereafter falling due would, if so presented when due, have been so paid.

144 Fifth. That on the first day of July, in the year 1872, the market value of the bond of the city of Mobile, number 631, for $1,000, which had been received by said Micou, as guardian as aforesaid, from said Lamar, was the sum of eight hundred and twenty-five dollars ($825.00).

Sixth. That on the 18th day of November, 1871, said last-mentioned bond of the city of Mobile, number 631, had a market value of eight hundred and fifty dollars ($850.00).

Seventh. That on the first day of July, 1867, the coupon on said last-mentioned bond falling due on that day, and amounting to forty dollars, would, if presented, have been paid by said city of Mobile, and that the similar coupon for every half-year's interest thereafter falling due would, if so presented when due, have so been paid.

Eighth. That on the first day of July, in the year 1872, the market value of the four bonds of the city of Mobile, numbers 36, 43, 101, and 109, for $100 each, which had been received by said Micou

145 as guardian as aforesaid from said Lamar, was the sum of three hundred and thirty dollars ($330.00).

Ninth. That on the 18th day of November, 1871, said last-mentioned bonds of the city of Mobile, Nos. 36, 43, 101, and 109, had a market value of three hundred and forty dollars ($340.00).

Tenth. That on the first day of July, 1867, the coupons on said last-mentioned four bonds falling due on that day, and amounting to thirty-two dollars, would, if presented, have been paid by said city of Mobile, and that the similar coupons for every half-year's interest on said bonds thereafter falling due would, if so presented when due, have been so paid.

Eleventh. That on the first day of July, in the year 1872, the market value of the two bonds of the city of New Orleans, numbers 3909 & 3910, dated July 1st, 1852, and due July 1st, 1892, for $1,000 each, which had been received by said Micou as guardian, as aforesaid, from

146 said Lamar, was the sum of fourteen hundred and fifty dollars ($1,450.00).

Twelfth. That on the 30th day of December, 1871, said last-mentioned bonds of the city of New Orleans, number 3909 and 3910, had a market value of fifteen hundred and twenty dollars ($1,520.00).

Thirteenth. That the amount of the two past-due coupons attached to each of said last-mentioned bonds, which, on the 24th day of May, 1867, were delivered to said guardian with said bonds, might have been collected from said city of New Orleans, and said Micou, as guardian as aforesaid, might have realized therefrom on or about said 24th day of May, 1867, the sum of one hundred and twenty dollars ($120.00).

Fourteenth. That on the first day of July, 1867, the coupons falling

due on that day on said last-mentioned two bonds, amounting to sixty dollars, would, if presented, have been paid by the city of New Orleans, and that the similar coupons for every half-year's interest on said
147 bonds thereafter falling due would, if so presented when due, have so been paid.

Fifteenth. That on the first day of July, in the year 1872, the market value of the three bonds of the city of Memphis, numbers 1096, 1126, and 1488, for $1,000 each, which had been received by said Micou as guardian, as aforesaid, from said Lamar, was the sum of eighteen hundred dollars ($1,800.00).

Sixteenth. That on the 22d day of April, 1871, said last-mentioned three bonds of the city of Memphis, numbers 1096, 1126, and 1488, for $1,000 each, had a market value of twenty-one hundred and seventy-five dollars ($2,175).

Seventeenth. That on the first day of July, 1867, the coupons falling due on that day on said last-mentioned three bonds, amounting to ninety dollars, would, if presented, have been paid by the city of Memphis, and that the similar coupons for every half-year's interest on said bonds thereafter falling due would, if so presented when due, have so so been paid.

148 Eighteenth. That the amount of the thirty-six past-due coupons which on the 24th of May, 1867, were delivered to said guardian with said last-mentioned three bonds might have been collected from said city of Memphis, and said Micou, as guardian as aforesaid, on or about the 24th day of May, 1869, might have realized therefrom the sum of one thousand and eighty dollars ($1,080.00).

It is also admitted that if the persons hereinafter more specifically mentioned, viz, James G. Mitchell, Alfred H. Isaacson, William S. McNeill, William M. Smith, John A. North, Josiah Sibley, & William C. Walton, were called as witnesses in behalf of the defendant herein, they would respectively testify to the statements hereinafter made after their respective names; and it is agreed that such statements may be herein admitted and considered as evidence with the like effect as if each of the said persons had been respectively called as a witness in be-
149 half of the defendants under a commission duly issued in this case for that purpose and had testified under oath before a commissioner to the truth of the statements herein set opposite his name.

1. JAMES G. MITCHELL, of Knoxville, Tenn., treasurer of the East Tennessee, Virginia and Georgia Railroad Company, would testify as follows:

All the coupons have been paid on one bond of the East Tennessee and Georgia R. R. Co. No. 17, due 1st July, 1866, endorsed by Andrew Johnson, governor of the State of Tennessee, and W. M. W. Burton, secretary of state, on the 4th August, 1856, for $1,000.

2. ALFRED H. ISAACSON, administrator of finance of the city of New Orleans, would testify as follows:

All the coupons up to and including January 1st, 1876, on bonds Nos. 3909 and 3910 of the city of New Orleans, dated 1st July, 1852, due 1st July, 1892, each for $1,000, have been paid.

150 3. WILLIAM S. MCNEILL, of Mobile, Alabama, secretary of the commissioners of Mobile, would testify as follows:

The city of Mobile did not make any default in the payment of the coupons on the bonds of that city due January 1, 1880; endorsed by the Mobile and Great Northern Railroad Company, W. D. Dunn, president, and J. W. Allen, secretary, from May 1867, until January, 1873, and that bond No. 631 of that class of bonds was in May, 1876, surren-

dered to the funding commissioners of the city of Mobile, together with the coupons thereon of July, 1874, Jan., 1875, July, 1875, and Jan., 1876, and thereupon a new bond of the city of Mobile was issued therefor, viz, bond No. 1456 for $500, and scrip certificate No. 221 for $105.20, the same amounting in all to $605.20, which sum was 51 % of the $1,000 bond No. 631 and interest remaining due thereon from January, 1874.

And the said McNeil would further testify that the books
151 of the commissioners of Mobile show further that bonds Nos. 36 and 43 of the city of Mobile for $100 each, due 1st July, 1873, coupons payable 1st of July and 1st of January, the first due 1st July, 1867, had been paid, and that bond No. 101 of similar tenor had been funded, and that as to bond No. 109, of similar tenor, he did not know whether it had been paid or funded, but that there had been no default in the payment of interest on either of said bonds prior to January, 1873.

4. WILLIAM M. SMITH, senior member of the firm of Smith & Collyer, attorneys at law, Memphis, Tennessee, would testify as follows:

That all the coupons prior to 1st of January, 1874, on bonds Nos. 1096 and 1126 of the city of Memphis, signed by A. V. Taylor, mayor, endorsed by the Memphis and Little Rock R. R. Co., James M. Williamson, president, and by the State of Tennessee, Andrew
152 Johnson, governor, April 10, 1856, for $1,000 each, have been surrendered or paid by the city, and that the same is true with reference to bond No. 1488 of the city of Memphis, signed by Thomas B. Carroll, mayor, and endorsed by the Memphis and Little Rock R. R. Co., D. B. Turner, president, and by the State of Tennessee, Andrew Johnson, governor, March 21, 1857.

And he would further testify that the said bonds have been redeemed by the sinking-fund commissioners, viz, said bond 1488, on the 31st December, 1874, and said bond 1096 on the 19th June, 1876, and said bond 1126 on 28th November, 1874, and that all of the above facts are shown by the records of the sinking-fund commissioners of the city of Memphis.

5. JOHN A. NORTH, of the city of Augusta, Georgia, now teller of the Bank of Augusta, former teller of the Mechanics' Bank of
153 Augusta, would testify that Mechanics' Bank stock of that city was worth from about 125 to 140 from the years 1856 to 1861.

6. JOSIAH SIBLEY, of that city, merchant, would testify that said last-mentioned bank stock was at all times during those periods worth above par, and he supposed it was about 125.

7. WILLIAM C. WALTON, attorney at law, of Augusta, Georgia, would testify that he had examined the records of the ordinary's office of the city of Augusta, and that those records show that on July 31, 1856, the Mechanics' Bank stock was valued, in a division of stock made under order of the superior court at that time, at $120 per share.

154 (Endorsed:) U. S. circuit court, southern dis't of New York. 7. Mary J. C. Micou, &c., vs. G. De Rosset Lamar. Ex. Copy stipulation proposed by defendant. Exhibit No. 1, Sept. 22, '80. J. H. G., master. U. S. circuit court. Filed Dec. 17, 1880. Joseph M. Deuel, clerk.

154*a* The President of the United States of America to Joseph W. Dimmick, esquire, commissioner of the circuit court of the United States for the middle district of Alabama, residing in the city of Montgomery, State of Alabama, greeting:

Know ye that we in confidence of your prudence and fidelity have appointed you a commissioner, and by these presents do give you full power and authority diligently to examine upon his corporal oath or

affirmation, before you to be taken, and upon oral interrogatories, Benjamin H. Micou, as a witness on the part of the defendant in a certain cause now pending undetermined in the circuit court of the United States of America for the southern district of New York, wherein Mary J. C. Micou, as administratrix with the will annexed of the goods, chattels, and credits which were of Ann C. Sims, deceased, is complain't, against G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, is defendant; and we do hereby require you, , before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal directed to James H. Gilbert, esq., master, No. 37 Wall street, at the city of New York, as soon as may be convenient after the execution of this commission; and that you return the same when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, this 10th day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth.

[L. S.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States for the Southern District of New York.

154*b* The executrix of this commission appears in certain schedules hereto annexed.

J. W. DIMMICK,
Commissioner

154*c* *Directions for executing the commission.*

Extract from the code of civil procedure of the State of New York relating to depositions taken without the State for use within the State.

§ 901. The person to whom a commission is directed, or before whom a deposition is taken, unless otherwise expressly directed in the commission, or in the order for taking the depositions, must execute the commission or order as follows:

1. He must publicly administer to each witness examined an oath or affirmation to testify the truth, the whole truth, and nothing but the truth, as to the matters respecting which the witness is to be examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing by a disinterested person. After it has been carefully read to or by the witness it must be subscribed by the witness.

3. If an exhibit is produced and proved the exhibit, or if the witness or other person having it in his custody does not surrender it a copy thereof, must be annexed to the deposition to which it relates, subscribed by the witness proving it, and numbered or otherwise identified, in writing thereupon, by the commissioner or person taking the deposition, who must subscribe his name thereto.

4. The commissioner or person taking the deposition must subscribe his name to each half sheet of the deposition; he must annex all the depositions and exhibits to the commission, or to a certified copy of the order for taking the deposition, with the certificate specified in the next

section; and he must close them up under his seal and address the packet to the clerk of the court at his official residence.

5. If there is a direction on the commission or in the order to return the same through the post-office he must immediately deposit the packet so addressed in the post-office and pay the postage thereon.

6. If there is a direction on the commission or in the order to return the same by an agent of the party at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons one or more of them may execute it as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission or order to take depositions authorized by this article.

§ 902. The commissioner or other person before whom one or more depositions are taken must subscribe and annex to each deposition a certificate substantially in the following form, the blanks being properly filled up:

STATE OF , *County of* , *ss:*

"I, , do certify that , the witness, personally appeared before me on the day of at o'clock in the noon, at the , in the State of , and after being sworn (or 'affirmed,' as the case may be) to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same, and indorsed the exhibits annexed thereto. And I further certify that I have subscribed my name to each half sheet thereof, and to each exhibit. And I further certify that appeared in behalf of the , and that appeared in behalf of the ."

154*d* *Instructions to commissioners.*

Annexed to the commission is an extract from the statutes of the State of New York, relative to the taking of testimony out of the State, which extract is directed by law to be annexed to the commission. But as it does not comprise everything necessary to be attended to by the commissioners, they are requested to observe the following more ample

INSTRUCTIONS:

I. All the commissioners named in the commission should have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified, or could not be notified, and the reasons for their not acting, be stated.

II. The commission must be executed by the commissioner named therein.

III. The acting commissioner will examine the witnesses separately, after publicly administering to them the following oath or affirmation:

"You do swear that the answers which shall be given by you to the interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth. So help you God."

The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon and kissing the Gospels.

But if the witness shall desire it, he shall be permitted to swear in the following form: "You do swear in the presence of the ever-living God;" and while so swearing he may or may not hold up his hand, in his discretion.

Or, if the witness shall declare that he has conscientious scruples against taking an oath, or swearing in any form, shall be permitted to make his affirmation in the following form: "You do solemnly, sincerely, and truly declare and affirm," omitting the words, "So help you God."

IV. The general style or title of the depositions must be drawn up in the following manner:

"Deposition of witnesses, produced, sworn (or affirmed), and examined, the day of in the year one thousand eight hundred and at under and by virtue of a commission issued out of the circuit court of the United States for the southern district of New York, in a certain cause therein depending and at issue, wherein

as follows:

A. B. of (insert his place of residence and occupation), aged years and upwards, being duly and publicly sworn (or affirmed), pursuant to the directions hereto annexed, and examined on the part of the doth depose and say as follows: First. To the first interrogatory he saith, &c. (Insert the witness's answer.) Second. To the second interrogatory, he saith, &c., and so on throughout.

If he cannot answer, let him say that he knoweth not.

V. If there be any cross-interrogatories, the witness will go on thus: First. To the first cross-interrogatory, he saith, &c., and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting commissioner will certify as follows:

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this day of , 18 , before

Commissioner.

VII. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to, and be subscribed by the witness, and be endorsed by the acting commissioners, in this manner:

"At the execution of a commission for the examination of witnesses, wherein

this paper writing was produced and shown to (insert the witness's name) and by him deposed unto at the time of his examination, before

Commissioners.

154*e* VIII. The acting commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the commmissioners will administer to him the following oath, and certify thereto:

"You do solemnly swear, that you will truly and faithfully interpret the oath and interrogatories to be administered to a witness now to be examined, out of the Engiish language into the language, and that you will truly and faithfully interpret the answers of the said thereto, out of the into the English language."

Let the depositions be subscribed by the interpreter as well as by witness, and certified by the acting commissioners, as follws:

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this day of , 18 , before

Commissioner.

X. The commissioner will make return on back of the commission by endorsement, thus:

"The execution of this commission appears in certain schedules hereunto annexed."

} *Commissioners.*

XI. The depositions and exhibits (if any) must be annexed to the commission, and then the commission, the directions, the interrogatories, the cross-interrogatories, depositions, and exhibits must be folded into a packet and bound with tape. The acting commissioners are to set their seal at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus:

U. S. circuit court, southern district of New York.

vs. }

To the circuit court of the United States for the southern district of New York, at the city of New York.
Care of , clerk.

XII. When the commission is thus executed, made up, and directed, it must be returned in the manner specified in the direction of the commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by one of the acting commissioners personally, or else be forwarded by some person coming to this place, who will be required, on his arrival, to make oath before one of the judges or the clerk of the court:

"That he received the same from the hands of A. B., one of the commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting commissioners in the nearest post-office, he making the following endorsement thereon:

"Deposited in the post-office at , this day of , 18 , by me.

Commissioner."

In case of returning the commission by a vessel, it is to be deposited by one of the acting commissioners in the letter-bag of such vessel, he making upon the commission the following endorsement:

"Deposited in the letter-bag of the , now lying at , and bound for the port of New York, this day of , 18 , by me,

Commissioner."

The commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission.

If the commission be returned by an agent, let him be instructed to call on his arrival at this place, upon

who will direct him as to its delivery.

155 Deposition of witness, produced, sworn and examined the 20th day of April, in the year one thousand eight hundred and eighty, at Montgomery, in the State of Alabama, under and by virtue of a commission issued out of the circuit court of the United States for the southern district of New York, in a certain cause therein depending and at issue, wherein Mary J. C. Micou, as administratrix with the will annexed of the goods, chattels, and credits which were of Ann C. Sims, deceased, is complainant against G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, is defendant.

Benjamin H. Micon, of Tallassee, Elmore County, Alabama, occupation, planter; aged fifty-four years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the defendant, doth depose and say as follows:

By consent of the parties the further examination of the witness is adjourned until Tuesday, April 27, 1880, at 12 o'clock m.

156 TUESDAY, *April* 27, 1880.

Came the said Benjamin H. Micou and also came D. S. Troy, esq., attorney for the said defendant, and David T. Blakey, esq., attorney for the said complainant.

And the said BENJAMIN H. MICOU being again duly sworn upon the Holy Gospel that the answer, which shall be given by him to the interrogatories proposed to him shall be the truth, the whole truth, and nothing but the truth, said examination is resumed as follows:

1st int'y (by D. S. TROY, esq.). Did you know Gazaway B. Lamar, now deceased?

Answer. Yes, sir.

2nd int'y (by same). Did you, as guardian of Ann C. Sims, receive from said Gazaway B. Lamar on or about May 24, 1867, certain securities, bonds, and coupons and other papers, for which you executed to him a receipt of that date, & copied on pages 26, 27, & 28 of the printed agreed statement of facts in this cause?

Answer. Yes; I received them by express and gave said receipt for them.

(J. W. Dimmick, commissioner.)

157 3rd int'y (by same). What disposition did you make of the bond of the East Tennessee & Georgia Railroad Company, No. seventeen, for $1,000 mentioned in said receipt?

Answer. That bond together with other bonds & coupons named in said receipt were put in package by me and put away in a bank vault of Micou and Morgan, bankers, in the city of Montgomery, a firm composed of myself and George W. Morgan. The package of papers was taken out afterwards by me, to examine and make inquiries as to their value, and I have no distinct recollection of the exact time when I had the papers out, but I recollect that I had them at the office where I usually transacted my private business, which was at the office of the Tallassee Manufacturing Company, in said city of Montgomery. I supposed un-

til after the commencement of this suit that said package of bonds and coupons was returned to the bank vault of Micou and Morgan
158 & that when in about 1870 or 1871 Micou & Morgan closed their business, said package of bonds and coupons was removed by my chief clerk, Mr. John C. Stratford, to the vault of the banking house of Holmes & Goldthwaite upon the institution of this suit or immediately after the commencement. I have looked for this package of papers and searched everywhere I thought it was possible for it to be, and enquired of all parties who had had access to it, but have never been able to find it. I mean by that the package above mentioned.

4th int'y (by same). Which of the bonds and coupons or other securities mentioned in the receipt which you gave to Gazaway B. Lamar were in the package mentioned in your preceding answer?

Answer. One bond of the East Tennessee and Georgia Railroad Company, No. 17, due 1st July, 1886, endorsed by Andrew Johnson, governor of the State of Tennessee, and W. N. W. Burton, secretary of state, on 4th August, 1856, for $1,000.00.

(J. W. Dimmick, commissioner.)

159 Twelve past-due coupons of the same bonds, protested, $350.00.

No. 631, one bond of the city of Mobile, due 1st January, 1880, endorsed by the Mobile and Great Northern Railroad Company, W. D. Dunn, president, and J. W. Allen, secretary, for $1,000.00; Nos. 3909 and 3910, two bonds of the city of New Orleans, dated 1st July, 1852, due 1st July, 1892, with coupons from July, 1866, each for $1,000=$2,000.00; Nos. 1096 and 1126, two bonds of the city of Memphis, signed by A. B. Taylor, mayor, endorsed by the Memphis and Little Rock Railroad Company, James M. Williamson, president, and by the State of Tennessee, Andrew Johnson, governor, April 10th, 1856, for $1,000 each—$2,000.00.

No. 1488, one bond of the city of Memphis, signed by Thomas B. Carrolls, mayor, and endorsed by the Memphis and Little Rock Railroad Company, D. B. Turner, president, and by the State of Tennessee, Andrew Johnson, governor. March 21, 1857, for $1,000.00; twenty-four coupons, past due and protested, of bonds Nos. 1096 and 1126, $30 each—$720.00.

160 Twelve coupons, past due, and protested 22nd January, 1867, of bond No. 1488, $30 each—$360.00.

Also, Nos. 36, 43, 101, and 109, four bonds of the city of Mobile, for $100 each, due 1st July, 1873; coupons payable 1st July and 1st January, the first due 1st July, 1867—$400.00.

Total amount of the par or nominal value of the above-named bonds and coupons being $8,840.00.

Also, deed from R. A. Shine, adm'r of Richard A. Shine, and deed from Mary S. Archer, adm'x of James T. Archer, each conveying to G. B. Lamar, as guardian for Ann C. Sims, one-fourth of the said tract of 1,800 acres of land, in consideration of the surrender by him to each of them the note of James T. Archer and the note of Richard A. Shine, due and unpaid, for $2,500 each. Also, the conveyance of Richard M. Abercrombie, dated 10th of May, 1859, of all he then had or might have in the estate of W. W. Sims, in right of his late wife, then deceased.

(J. W. Dimmick, commissioner.)

Also, two notes, each for $2,750, dated April 15th, 1859, of the
161 said Rev. Richard M. Abercrombie, payable six months after his decease, without interest.

Also, Mrs. Ann Sims' receipt for two bonds Confederate States 15-million loan for $1,000 each, dated August 10th, 1862.

Also, Mrs. Ann Sims' receipt for Nos. 316, 317, 318, 319, 320, 321, and 322, seven bonds of the Confederate States 15-million loan, dated March 12, 1863.

Also, No. 132, Bank of Commerce certificate for thirty shares stock for Miss M. M. Sims 8th, July, 1857.

Also, No. 133, Bank of Commerce certificate for thirty shares stock for Miss Ann C. Sims, 8th July, 1857.

Also, No. 136, Bank of Commerce certificate for nine shares stock for Mrs. M. C. Abercrombie, 8th July, 1857.

5th int'y (by same). What did you do with the two other papers mentioned in the receipt?

Answer. I drew the money for the check of Merchants' National Bank, Savannah, for $808.70, and the deed of Whitner and Myers, masters, &c., to William W. Cheever, I have.

162 6th int'y (by same). Why was that deed not left in the package containing the other deeds and papers?

Answer. The deed was so very large that the envelope containing the other papers would not hold it, so I put it with my other deeds and papers.

7th int'y (by same). About how long after you received these papers from Mr. Lamar was it that you had them in your office, as above stated?

Answer. I had them soon after my return from Europe, October, 1867.

8th int'y (by same). Is that the last time you have seen the package or any of the papers it contained?

Answer. My best recollection is that I had them out as often as twice after I first got them out as above stated; within a few months of the time first stated.

(J. W. Dimmick, commissioner.)

163 9th int'y (by same). Had you made no examination or inquiry as to the value of the papers before your return from Europe?

Answer. I think not. At the time of the receipt of these papers I was suffering from broken ankle, and was confined a great deal to my room from the 24 May, 1867, until about the 1st July, 1867, about which time I left home for Europe, and did not return until about the 1st of October, 1867.

10th int'y (by same). State as near as you can the date you had the papers out the last time for examination.

Answer. I suppose it was about the month of March or April, 1868.

11th int'y (by same). Did you never see the package or any of the papers it contained after that date?

Answer. I don't think I did.

12th int'y (by same). Do you state that as your best recollection?

164 Answer. I give that as my best recollection, for the reason that I had during the few months previous written to the different points where said bonds and coupons were payable, and also to New York City, for information as to their value; and I ascertained by these writings that the market value was very difficult to be ascertained, and the price quoted for them was so very low that I determined to lay them away in hopes that in a few years they would be of greater value to Miss Sims.

I was in a condition at that time myself not to need the money suffi-

ciently, as I considered, to make a sacrifice in the sale of the securities at the prices I would have to do to effect a sale.

Miss Sims, the owner of these securities, was a member of my family and treated by me as my own daughter, and she did not need the money for these securities.

(J. W. Dimmick, commissioner.)

13th int'y (by same). Did you at any time collect any of the
165 coupons or surrender any of the bonds or coupons for other bonds or coupons issued to take them up?

Answer. I have no recollection of ever having done so. I feel quite sure I did not.

14th int'y (by same). Did you institute any legal proceedings to enforce the collection of any of the past due coupons above mentioned?

Answer. I did not.

15th int'y (by same). Did you at any time dispose of any of the bonds or coupons to any other person, by a sale or transfer, or by depositing or hypothecating the same as collateral?

Answer. I answer that I did not make any transfer to any person whatever to sell these bonds and coupons. I have no recollection of ever having hypothecated them.

16th int'y (by same). Can you not say positively whether or
166 not you ever sold any of the bonds or coupons or used any of them as collateral?

Answer. I can say positively that I never sold any of the bonds or coupons, and I have no recollection of ever having used them as collateral.

17th int'y (by same). But you will not state positively that you did not use them as collateral?

Answer. My recollection is that I did not.

18th int'y (by same). Is it not possible that you may have used them as collateral and have forgotten it?

Answer. I don't think it is possible.

19th int'y (by same). If you did use them as collateral, did you or not get them back from the person with whom you deposited them?

Answer. No; I am certain that I never deposited them as collateral and got them back.

(J. W. Dimmick, commissioner.)

167 20th int'y (by same). Are you certain that the package containing the bonds and coupons was returned to the vault of Micou and Morgan after you last had them in the office where you did your private business?

Answer. I am not certain on that point.

21st int'y (by same). What is you' best recollection?

Answer. My best recollection is that the package was returned.

22d int'y (by same). When was it after the spring of 1868 that you first made inquiry or search for said bonds and coupons or the package containing them?

Answer. I searched for them early in the spring of 1874. I did not think they were lost, but I thought would find them somewhere; but in the fall of 1874, just after this suit was first instituted, I made thorough search for them, and have searched for them repeat-
168 edly sincethen, and have never been able to find them.

23d int'y (by same). Did you advertise them or offer any reward for their return or discovery?

Answer. I did not.

24' int'y (by same). What time did your own pecuniary troubles commence?

Answer. First of November, 1873.

25' int'y (by same). Had you not been, for months previous to that time, Nov. 1st, 1873, much pressed for money for the Tallassee Factory of which you was president, and borrowing large sums at high rates of interest, say from 1½ to 1½ per cent. per month?

(Davi T. Blakey, esq., attorney for complainant, objects to the foregoing question on the ground that is irrelevant.)

(J. W. Dimmick, commissioner.)

Answer. Yes; I had for some months.

169 26' int'y (by same). Were you not much pressed during the summer and fall of 1873, prior to Nov. 1, 1873, to procure and furnish sufficient and satisfactory collaterals or other security for the money which you was borrowing as above stated?

(David T. Blakey, esq., attorney for complainant, objects to the foregoing question on the ground that it is irrelevant.)

Answer. I was not pressed to furnish collaterals until Nov., 1873. I had to borrow large sums of money during the time stated, but the credit of Tallassee Factory and Barnett, Micou & Co. was sufficient to borrow it without collaterals.

27' int'y (by same). Why did you make no effort to collect the past-due coupons above mentioned and the coupons on the bonds which matured after you received them, from 1868 to 1874, and the bonds of the city of Mobile which matured in July, 1873?

170 Answer. In answer to that question I will state that all the coupons delivered to me by Lamar due up to May, 1867, had been presented and protested for non-payment by said Lamar. The coupons falling due after May, 1867, I thought it was useless to go through the formality of a protest, as there were no means provided for their payment at the places at which they were due.

28' int'y (by same). Did not your ward, Ann C. Sims, arrive at the age of twenty-one years on the 1st of June, 1872, or about that time?

Answer. Yes; Ann C. Sims became of age on the 1st of June, 1872.

29' int'y (by same). Did you have any settlement with her as her guardian after she arrived at the age of 21 years?

(J. W. Dimmick, commissioner.)

Answer. On the 1st of June, 1872, I informed her what the settlement that Mr. Lamar had made with me, and told her that the
171 outcome of it was so small that in order to make up her dowry to what it ought to be I gave her my note for ten thousand dollars as a gift, interest to be paid to her annually for her support, principal to be paid five years from date, or before if she married. I executed and delivered the note to her. I had no other settlements with her.

30' int'y (by same). Did she give to you any release, discharge, acquittance, or receipt?

Answer. She gave me no release, discharge, acquittance, or receipt. The ten thousand dollars was a gift from me to her, independent of the property which I held as her guardian.

31' int'y (by same). Why did you not turn over to her the property which you held as her guardian?

Answer. I was keeping it in hopes as time passed on it would increase in value.

172 32' int'y (by same). Did you pay her any interest on the note for ten thousand dollars? If so, when, and how much?

Answer. I paid her interest regularly on the note for one year up to June, 1873, at 8 per cent.

33' int'y (by same). Had you not informed Miss Sims before June 1st, 1872, of the settlement which Mr. Lamar had made with you of his guardianship?

Answer. I don't recollect that I informed Miss Sims myself. She was with my family in England at the time the settlement was made, and I wrote to my wife, her aunt, giving the particulars of the settlement.

34' int'y (by same). When in June, 1872, you informed Miss Sims of the settlement you had made with Mr. Lamar, her former guardian, and gave her the note for ten thousand dollars, did she express any dissatisfaction with the settlement you had made with Mr. Lamar?

(J. W. Dimmick, commissioner.)

173 (D. T. Blakey, esq., attorney for complainant, objects to the foregoing question as being irrelevant.)

Answer. In June, 1872, when I gave Miss Sims the note for ten thousand dollars, I did not enter into any particulars as to the settlement made by me with Mr. Lamar, but only stated to her that I had received $808.70 in cash, and a little over $8,000 in bonds & coupons, which were of such slow value that I was keeping in hopes that they would improve. There was no expression of opinion by her as regards the settlement with Mr. Lamar.

35' int'y (by same). Did you not, on or about the 21st of July, 1862, as agent for G. B. Lamar, guardian for Martha M. and Ann C. Sims, purchase for said wards one five-thousand-dollar Alabama 8 per cent. bond & one $2,000 *dollar* Confederate States 15-million-loan bond, & draw on Mr. Lamar for $7,235.80 to pay for said bonds, as set forth on pages nine & ten of said agreed statement of facts?

174 (D. T. Blakey, att'y for complainant, objects to the foregoing question as being irrelevant.)

Answer. Yes; I bought them for Mr. Lamar & drew upon him individually for the money.

36' int'y (by same). Did you not, on or about 12th of March, 1863, sell the Alabama bond above mentioned & purchase with the proceeds seven Confederate States 15-million-loan bonds for $1,000 each for Mr. Lamar as such guardian, & did not Mr. Lamar, as such guardian, on or about 24th March, 1863, remit to you $420, balance due on such purchase, as shown on pages 11 & 12 of said agreed statement of facts, and was not this sale and reinvestment by Mr. Lamar made upon your advice?

(D. T. Blakey, att'y for complainant, objects to the foregoing question as being irrelevant.)

(J. W. Dimmick, commissioner.)

Answer. The sale & purchase was made at the request of Mr.

175 Lamar. He signed his letters in his own name, but I understood from him that the purchases were for the benefit of his two wards. I gave him no advice as to the investment of any money for his wards. He never asked my advice in any case.

37' int'y (by same). Did not the $2,000 Confederate States 15 million loan, and the $5,000 Alabama 8 per cent. bond, until it was sold as above stated, and the $7,000 Confederate States 15 million loan, purchased with the proceeds of the Alabama 8 per cent. bond, remain with you or with Mrs. Ann C. Sims, grandmother of the wards?

Answer. It was handed over to Mrs. Ann C. Sims; she receipted Mr. Lamar for it. (Here the witness asks to correct his answers to a previous interrogatory, and says, I see a letter printed in the agreed state-

ment of facts on page 9, dated Savannah, July 9, 1862, before the purchase of the Alabama bonds, from which it appears that Mr. La-
176 mar did ask my advice as to the investment of $5,000 or $7,000 of Confederate States currency which he stated that he held as belonging to Misses Sims.)

38' int'y (by same). Who collected the coupons on the Confederate States bond and the Alabama 8 % bond before they were sold, & what disposition was made of the Confederate States bond for $2,000 & for $7,000 delivered to Mrs. Ann C. Sims?

(J. W. Dimmick, commissioner.)

Answer. In answer to the first as to collection of the coupons, it appears that the $5,000 Alabama bond & the $2,000 Confederate States 15 million bond were purchased July 24, 1862. It appears also from the statement of facts in the case that 12th March, 1863, that the Alabama bonds were sold, and the money for said sale was invested in 7 Confederate States bonds, & that I presume that the accrued interest between the time of purchase and the time of sale was accounted for to Mr. Lamar in the statement rendered by me, the receipt of which
177 is acknowledged in statement of facts in the case, page 12, letter dated Savannah, March 24, 1863, to which letter there is no signature, but it is admitted that it is a letter from Mr. Lamar to me. As regards the 7 15-million-loan bonds purchased by me they were handed over to Mrs. Ann C. Sims & receipted for by her to Mr. Lamar. I have found in the effects left by Mrs. Ann C. Sims, since her death, these 7 bonds which are more particularly stated 316, 317, 318, 319, 320, 321, & 322; said bonds have been sent by me recently to Messrs. Nash & Holt, att'ys, New York, & the coupons had never been cut off of them; they were on the bonds. I had no charge of the 7 bonds, as appears in the statement of facts to be admitted that I deposited with Mrs. Ann C. Sims said bonds on 12 of March, 1863, & sent her receipt for same in letter of that date to Mr. G. B. Lamar. As to the 2 Confederate bonds first bought 21st July, 1862, & for which it appears that Mrs.
178 Sims executed a receipt dated August 10, 1862, I know nothing except that I purchased & delivered them to Mrs. Sims according to instructions from Mr. Lamar.

39' int'y (by same). Were you not the business manager for Mrs. Ann C. Sims?

Answer. No, sir. She had a friend in Augusta, Ga., Mr. John Phenizy.

40' int'y (by same). Do you know what disposition she made of the Confederate bonds for $2,000 delivered to her on 10th August, 1862?

Answer. I do not know; these bonds may be with her effects. When written to by the att'ys, Nash & Holt, of New York, I examined only for 7 bonds of particular numbers, & found those & sent them on; the other two may be in the same parcel. I can't say here, as the paper are not at hand.

(J. W. Dimmick, commissioner.)

41st int'y (by same). Did you find any other Confederate
179 States bonds among the papers of Mrs. Ann C. Sims besides the 7 you sent to Holt & Nash?

Answer. I think I did; I think I recollect seeing others.

42nd int'y (by same). Did not Mrs. Ann C. Sims, on the 10th of August, 1862, have the immediate charge & control of her two granddaughters, wards of Mr. Lamar?

Answer. They lived there with her & my wife in my house; they looked up to her as their grandmother.

43rd int'y (by same). Did the other bonds which you found in the effects of Mrs. Ann C. Sims besides those you sent to Nash & Holt have all the coupons on them?

Answer. I did not examine any but the 7 bonds sent, supposing they included all that were mentioned in the case.

44' int'y (by same). Have you not still control of the effects of Mrs. Ann C. Sims?

180 Answer. The effects of Mrs. Ann C. Sims are in possession of my wife.

Here the direct examination closed.

Cross-examined:

1st cross-int'y (by DAVID T. BLAKEY, counsel for complainant). When did Micou & Morgan cease to do business as bankers in Montgomery?

Answer. I answer to the best or my recollection, in the fall of 1871.

2' cross-int'y (by same). What became of the valuable papers that you had deposited with them when their business closed?

Answer. I arranged with Holmes & Goldthwaite, bankers, Montgomery, Alabama, to pay all depositors of Micou & Morgan. They were to take into their employ my principal clerk, Mr. John C. Stratford, & all the valuable papers deposited with Micou & Morgan were transferred to saidHolmes & Goldthwaite, in charge of John C. Stratford.

(J. W. Dimmick, commissioner.)

181 3' cross-int'y (by same). Would the bonds and coupons heretofore inquired about have been so transferred if they had been with Micou & Morgan?

Answer. Yes.

4' cross-int'y (by same). Have you ever withdrawn or received said bonds and coupons, or any of them, from Holmes & Goldthwaite, or authorized any other person to do so?

Answer. No.

5' cross-int'y (by same). Did you have a regular business habit of depositing & keeping with Micou & Morgan all your valuable papers during the existence of said firm?

Answer. I kept with them all valuable papers except deeds to lands; I kept them myself.

6' cross-int'y (by same). Were these bonds and coupons such

182 papers as, according to your business habits, you would have kept with Micou & Morgan?

Answer. Yes.

7' cross-int'y (by same). Have you any reason to believe that you deviated from that business habit in regard to those bonds & coupons?

Answer. No.

8' cross-int'y (by same). Have you any knowledge or recollection that said bonds and coupons, or any of them, have been in your possession since last deposited with Micou & Morgan?

Answer. No.

9' cross-int'y (by same). Have you ever derived any pecuniary benefit in an' manner whatever for yourself or for Miss Sims from the use of said bonds and coupons or any of them?

Answer. None whatever.

183 10' cross-int'y (by same). When the settlement spoken of in the direct interrogatories occurred upon Miss Sims becoming of age, if you had charged her a reasonable sum for the board of herself

and deceased sister during the time they had lived in your family & other ordinary & reasonable expenses paid by you for her & her said sister, & had given her credit for the cash received from Mr. Lamar & the market value of the bonds & coupons turned over by him, would you have been indebted to her in any sum?

(Counsel for defendant objects to the foregoing interrogatory, upon the ground that it is irrelevant and immaterial.)

Answer. I answer that the 2 children came to live with me about February, 1860; that eldest, Martha M. Sims, died at my house in the fall of 1864, & the other remained with me until she was of age and after; that the entire support of the children, their clothing, ed-
184 ucation, doctor's bill, burial expenses, was borne by me, and I think a reasonable charge for this expense would have been considerable more than the $808.70 cash received by me from Mr. Lamar in 1867, together with the market value of the bonds & coupons sent me at the same time. During the time stated I received no money from Mr. Lamar or Mrs. Sims or any other person on account of the expense for said children. I made no charge for same.

11' cross-int'y (by same). Was the note for the thousand dollars given by you or accepted by Miss Sims as a part of any settlement of any indebtedness by you to her?

Answer. The note was simply a gift, from natural affection, & had no regard to any settlement.

12' cross-int'y (by same). Has that note ever been paid; and, if not, why not?

(J. W. Dimmick, commissioner.)

185 Answer. The note has never been paid. I became insolvent in the fall of 1873, and was not able to pay it.

13' cross-int'y (by same). Is not the note now barred by the statute of limitations of Alabama?

Answer. Yes; I believe so.

Here the cross-examination was closed.

Rebutting interrogatories by counsel for defendant:

Was not John C. Stratford, the principal clerk of Micou & Morgan, a man of good character for honesty and integrity, & has he not retained that character, and is he not now an officer in the First National Bank of this city?

Answer. Yes; I do not for a moment suspect that John C. Stratford derived any benefit from said bonds and coupons, or that he knew anything about how they disappeared or got misplaced.

BENJ. H. MICOU.

186 Here the examination closed.

Examination taken reduced to writing, and by the witness subscribed and sworn to this twenty-seventh day of April, 1880, before—

J. W. DIMMICK,
Commissioner.

STATE OF ALABAMA,
County of Montgomery, ss:

I, J. W. Dimmick, do certify that Benj. H. Micou, the witness, personally appeared before me on the 20th day of April, 1880, and by consent of the parties the examination of said witness was adjourned until this the 27th day of April, 1880, at 12 o'clock m., at my office, corner of

Monroe and Perry streets, in the city of Montgomery, in the State of Alabama; and after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same.

187 And I further certify that I have subscribed my name to each half sheet thereof; and I further certify that David T. Blakey, esq., attorney, appeared in behalf of the complainant; and that D. S. Troy, esq., attorney, appeared in behalf of the defendant.

J. W. DIMMICK,
Commissioner.

(Endorsed:) Filed Dec. 17, 1880.

188 U. S. circuit court, southern district of New York.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., of Ann C. Sims, deceased,
vs.
G. DE ROSSET LAMAR, EX'R, &C.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., of Martha M. Sims, deceased,
vs.
G. DE ROSSET LAMAR, EX'R, &C.

It is hereby stipulated that the following facts be admitted upon the accounting pending in the above-entitled actions:

The ten shares of Mechanics' Bank stock referred to at folio 9 in the agreed statement of facts in these suits were shares of stock of the Mechanics' Bank of Augusta, Georgia, which had belonged to William W. Sims, the father of Ann C. Sims and Martha M. Sims, the wards of Gazaway B. Lamar, in his lifetime, and which, upon his death,

189 passed to his widow as administratrix of his estate.

William W. Sims and Margaret Abercrombie died each intestate, and their said children, Ann C. Sims and Martha M. Sims, were the next of kin of each of them. The said Mechanics' Bank of Augusta, Georgia, became insolvent about 1865, and its stock then became and has since been valueless. The dividends on Mechanics' Bank stock mentioned in said guardian's accounts, at folio 97 in said statement of facts, were derived from said ten shares.

The nine shares of the Bank of Commerce, also referred to at folio 9 of said statement of facts, were shares of the stock of the Bank of Commerce, of Savannah, Georgia, and are the same shares of stock referred to at folio 82 of said statement of facts. The said Bank of Commerce of Savannah, Georgia, became insolvent about 1865, and its stock then became and has since been valueless. The market value of said Bank of Commerce stock from the death of Mrs. Abercrombie

190 until the beginning of the war in 1861 was at least $100 per share.

The Confederate bonds purchased during the war with moneys belonging to the estate of said wards and held by Mrs. Ann Sims for their benefit were retained by her through the war, and at its close became and have since been valueless. No coupons were cut from said bonds or interest collected thereon after their said purchase.

During the year succeeding, May 24, 1867, the market value of the bond of the East Tennessee and Georgia R. R. Co. delivered to Mr. Micou on that day was from $650 to $700.

The market value of the $1,000 bond of the city of Mobile, then delivered, was from $800 to $850 in August, 1868, and from $330 to $400 at the end of 1874. No quotations prior to August, 1868, have been obtained, but it is assumed that the market value between May 24, 1867, and August, 1868, was the same as at the latter date, viz, August, 1868.

The market value of the two bonds of the city of New Orleans,
191 then delivered, was, in May, 1867, 91½ to 92½, that is to say, $1,830 to $1,850; in August, 1868, 63 to 75, that is to say, $1,260 to $1,500, and at the end of 1874, 45 to 52, that is to say, $900 to $1,040. No quotations have been obtained between May, 1867, and August, 1868.

The market value of the three bonds of the city of Memphis, then delivered, was, in August, 1868, from 60 to 62, that is to say, $1,800 to $1,860, and at the end of 1874 from 48 to 55, that is to say, from $1,440 to $1,650. No quotations prior to August, 1868, have been obtained, but it is assumed that the market value between May 24, 1867, and August, 1868, was the same as at the latter date, August, 1868.

It is further stipulated that W. S. Roberts, of Augusta, Georgia, if called as a witness, would testify as hereinafter stated, and that the statement hereinafter contained be admitted as evidence with like effect as if duly testified to by him under oath in this action.

I, W. S. Roberts, am, and since 1841 have been, a resident of
192 Augusta, Georgia, and during that time have been actively engaged in business there. My present business is that of a banker, being president of the Bank of Augusta. I knew Gazaway B. Lamar in his lifetime. He was an uncle by marriage to my wife. From 1847 to 1865 I was a shareholder and director of the Mechanics' Bank of Augusta, Georgia, ten shares of the stock of which bank are referred to at folio 9 of the agreed statement of facts herein. That bank became insolvent and closed its business in 1865. I do not know where the books of said bank now are. I have made inquiries about them from persons likely to know about them. The last I heard of them they were in an old bookstore, no care being taken of them and being regarded as rubbish. This was several years ago. The stock of said bank was valuable, and seldom changed hands except by death.
193 It would have brought readily $150 a share in gold on the 1st of January, 1861. It would readily have sold for from $140 to $150 gold per share at any time from 1856 to 1860.

Dated August 16, 1880.

DICKERSON & BEAMAN,
Sol'r' for Def.

NASH & HOLT,
Solicitors for Pl'ff.

(Endorsed:) U. S. circuit court, southern dist. of New York. Mary J. C. Micou, &c., vs. G. De Rosset Lamar, ex'r. Stipulation proposed by plaintiff. Nash & Holt, pl'ff's sol'rs, 51 William st., N. Y. U. S. circuit court. Filed Dec. 17, 1880. Joseph M. Deuel, clerk.

194 U. S. circuit court, southern district of New York.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., of Ann C. Sims, deceased,
vs.
G. DE ROSSET LAMAR, EX'R, &C.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., of Martha M. Sims, deceased,
vs.
G. DE ROSSET LAMAR, EX'R, &C.

It is hereby stipulated that the following additional facts be admitted on the accounting pending in the above-entitled actions:

The market value of bonds Nos. 36, 43, 101 & 109 of the city of Mobile for one hundred dollars each, delivered to Mr. Micou May 24, 1867, was from eighty dollars to eighty-five dollars each in August, 1868, and from thirty-three to forty dollars at the end of 1874. No quo-
195 tations prior to August, 1868, have been obtained, but it is assumed that the market value between May 24, 1867, and August, 1868, was the same as at the latter date, viz, August, 1868.

NASH & HOLT,
Solicitors for Complainants.
DICKERSON & BEAMAN,
Solicitors for Defendant.

(Endorsed:) U. S. circuit court. Mary J. C. Sims, as adm'x, &c., vs. G. De Rosset Lamar, ex'r, &c. Proposed additional stipulation. U. S. circuit court. Filed Dec. 17, 1880. Joseph M. Deuel, clerk.

196 U. S. circuit court, southern district of New York.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., of Ann C. Sims, deceased,
vs.
G. DE ROSSET LAMAR, AS EXECUTOR, &C., OF Gazaway B. Lamar.

To the honorable the circuit court of the United States for the southern district of New York.

I, the undersigned the master appointed by a decree of this court, made and entered herein, and bearing date the day of January, 1880, to take an account of the estate of Ann C. Sims, which came to the hands of Gazaway B. Lamar, as her guardian, or which without his default might have so come to his hands, do respectfully report that I have been attended by counsel for the respective parties hereto, and by their witnesses, and that I have heard their allegations and
197 proofs in the premises, and that the proofs and examinations had and taken before me are hereto annexed, and form a part of this report.

And I do further report that I have taken and stated an account of the estate of the said Ann C. Sims, which came to the hands of the said Gazaway B. Lamar, as her guardian, or which without his default might have so come to his hands, and I herewith report the said account and certify the same to this court.

And I do further find and report that at the time of the appointment

of the said Gazaway B. Lamar, as her guardian, the said Ann C. Sims, as next of kin of her deceased father, had an equal undivided third interest in ten shares of stock of the Mechanics' Bank, of Augusta, in the State of Georgia, which interest was by the death of her mother increased, and became an equal undivided half intgrest in the said stock, on or before the first day of July, 1859; and that the said Ann C. Sims, on or before the said first day of July, 1859, as next of
198 kin of her deceased mother, and by virtue of a renunciation executed by the husband of her mother, became entitled to a one equal undivided half-interest in nine shares of stock of the Bank of Commerce, of Savannah, in the State of Georgia.

And I do further find and report that the said Gazaway B. Lamar might, with reasonable diligence, have collected the said third-interest of his said ward in the said ten shares of stock of the Mechanics' Bank of Augusta, within eighteen months from the date of his appointment, to wit, on or before the 11th day of June, 1867, and I have accordingly charged him in the said account with the market value of the said interest at that time, which I find to be the sum of four hundred dollars.

And I do further find and report that the said Gazaway B. Lamar might, with reasonable diligence, have collected the remaining one-sixth interest of his said ward in the said stock within eighteen months from the time when it accrued, to wit, on or before the first day
199 of January, 1861, and I have accordingly charged him with the market value of said interest at that time, which I find to be the sum of two hundred dollars.

And I do further find and report that the said Gazaway B. Lamar might, with reasonable diligence, have collected the said interest of his said ward in the said stock of the Bank of Commerce within eighteen months from the time when the same accrued, to wit, on or before the first day of January, 1861, and I have accordingly charged him with the market value of such interest at that time, which I find to be the sum of four hundred and fifty dollars.

And I do further report that it has not been made to appear to me that Benjamin H. Micou, named in the said decree, who succeeded the said Lamar as guardian of the said Ann C. Sims, has ever realized anything from the securities in said decree mentioned, but that it does appear, and I accordingly do find and report that he might have realized therefrom when the same was delivered to him by the said La-
200 mar, on the 24th day of May, 1867, the sum of five thousand seven hundred and ten dollars, as follows:

From the bond number 17 for $1,000, of the East Tennessee and Georgia Railroad, the sum of seven hundred dollars.

From the bond number 631, of the city of Mobile, the sum of eight hundred and fifty dollars.

From the two bonds numbers 3909 and 3910, of the city of New Orleans, with the past due coupons thereon, the sum of nineteen hundred and seventy dollars.

From the three bonds numbers 1096, 1126, and 1488, of the city of Memphis, the sum of eighteen hundred and sixty dollars.

From the four bonds numbers 36, 43, 101, and 109, of the city of Mobile, the sum of three hundred and thirty dollars.

And I do further report that in stating the account of the said Lamar I have given him credit for the aforesaid sum as will for the sum of eight hundred and eight dollars and seventy cents, paid over by him to the said Micou on the 24th day of May, 1867.

201 And I do further report that it has been made to appear to

me that the securities aforesaid have been lost or mislaid by the said Micou.

And I do further find and report that the highest value of the said securities since they were delivered to the said Micou by the said Lamar was as follows:

The bond number 17, of the East Tennessee and Georgia Railroad, has now a value of one thousand dollars.

The twelve coupons on said bond which on the said 24th day of May, 1867, were past due, and could not then be collected, might have been collected on or about the 24th day of May, 1869, and would then have realized the sum of three hundred and sixty dollars, and the coupons for half-yearly interest on said bonds, amounting each to the sum of thirty dollars, falling due on the first day of July, 1867, and half-yearly thereafter, would have been paid when duly presented.

The highest market value of the bond, number 631, of the city of Mobile, was on or about the 18th day of November, 1871, the
202 sum of eight hundred and fifty dollars, and the coupons thereon for half-yearly interest, amounting each to the sum of forty dollars, falling due on the first day of July, 1867, and half-yearly thereafter, would have been paid when due if presented.

The highest market value of the two bonds numbers 3909 and 3910, of the city of New Orleans, was in May, 1867, the sum of eighteen hundred and fifty dollars, and the coupons thereon for half-yearly interest, amounting each to the sum of sixty dollars, falling due on the first day of July, 1867, and half-yearly thereafter, would have been paid paid when due if presented.

The highest market value of the three bonds of the city of Memphis, numbers 1096, 1126, and 1488, was on or about the 22nd day of April, 1871, the sum of twenty-one hundred and seventy-five dollars, and the thirty-six coupons on said bond, which, on the said 24th day of May, 1867, were past due, and could not then be collected, might have been collected on or about the 24th day of May, 1869, and would then have
203 realized the sum of one thousand and eighty dollars. The coupons thereon for half-yearly interest, amounting each to the sum of ninety dollars, and falling due on the first day of July, 1867, and half-yearly thereafter, would have been paid when due if presented.

The highest market value of the four bonds of the city of Mobile, numbers 36, 43, 101, and 109, was, on or about the 18th day of November, 1871, the sum of three hundred and forty dollars, and the coupons thereon, for half-yearly interest, amounting each to the sum of eight dollars, and falling due on the first day of July, 1867, and half-yearly thereafter, would have been paid when due if presented.

And I do further find and report that the balance of said estate in the hands of the said Gazaway B. Lamar on the said 24th day of May, 1867, and for which he is accountable, amounted on that day to the sum of two thousand six hundred and forty-two dollars and seven cents, which with interest, computed with annual rests at the rate of five
204 per centum per annum, will on the 1st day of January, 1881, amount to the sum of four thousand eight hundred and seventy-five dollars and forty-nine cents, and with simple interest computed at the rate of seven per centum per annum, until the 1st day of January, 1880, and thereafter at the rate of six per centum per annum, will on said 1st day of January, 1881, amount to the sum of four thousand eight hundred and fifty-one dollars and two cents.

And I do further report that at the request of counsel for the defendant I have computed the legal commission of the said Gazaway B.

Lamar upon the said estate, and that the same amount to the sum of three hundred and sixteen dollars and fifty-nine cents.

And I do further find and report that the said Gazaway B. Lamar could not have collected the interest of his said ward in the stock of the said Mechanics' Bank and Bank of Commerce, without cost to the estate of his said ward, but that there is no evidence before me to
205 show what that cost would have been.

All of which is respectfully submitted.

Dated New York, December 13, 1880.

JAMES H. GILBERT, *Master.*

(Endorsed:) U. S. circuit court, southern district of N. Y. Mary J. C. Micou, as adm'x, &c., of Ann C. Sims, dec'd, vs. G. De Rosset Lamar, as ex'r of G. B. Lamar. Report. U. S. circuit court. Filed Dec. 17, 1880. Joseph N. Deuel, clerk.

1856.			
Jan.	1. To paid for letters of guardianship		3 75
Ap'l	10. " " Mrs. Abercrombie		125 00
	" " " "		1,555 03
	Balance January 1, 1857		5,271 38
			6,955 16
1857.			
Jan'y	3. To paid Mrs. Abercrombie		125 00
July	1. " " "		125 00
"	13. " " Dr. Green, services		15 00
Dec.	31. " " Mrs. Abercrombie		128 12
	Balance January 1, 1858		5,298 26
			5,691 38
1858.			
Jan.	To paid Mrs. Abercrombie		131 25
July	" " Dr. Green		12 00
	Balance January 1, 1859		5,418 58
			5,561 83
1859.			
Jan'y	To paid Mrs. Abercrombie		131 12
March	" cash to Mrs. Ann Sims		125 00
	" paid nurse		1 50
	" " passage to Savannah, &c.		26 50
	" " Rev'd Mr. Abercrombie		115 85
	" balance Jan'y 1, 1860		5,283 52
			5,683 49
1860.			
Feb.	To paid cash to Mrs. Sims		125 00
	Balance Jan'y 1, 1861		5,920 61
			6,045 61
1861.			
	Balance Jan'y 1, 1862		6,834 78
1862.			
	Balance Jan'y 1, 1863		7,130 81

1856.			
Jan'y	1. By cash from Mrs. Abercrombie		5,166 80
"	" her half of $100 of Mrs. Sims		50 00
Feb.	11. " ½ dividends Mechanics' Bank		155 00
"	" cash from Mrs Abercrombie		1,555 03
Oct	1. " ½ dividends Mechanics' Bank		33 33
			6,955 16
1857.			
Jan'y	1. By balance forward		5,271 38
May	20. " ½ dividend Mechanics' Bank		20 00
June	11. " ⅕ interest (market value) 10 shares stock of Mechanics' Bank		400 00
			5,691 38
1858.			
Jan'y	1. By balance forward		5,298 26
"	" interest on balance of Jan'y 1, 1857		263 57
			5,561 83
1859.			
Jan'y	1. By balance forward		5,418 58
"	" interest on balance of Jan'y 1, 1858		264 91
			5,683 49
1860.			
Jan.	1. By balance forward		5,283 52
"	" interest on balance of Jan. 1, 1859		270 93
M'ch	26. " ½ B. A. Major's note collected		491 16
			6,045 61
1861.			
Jan'y	1. By balance forward		5,920 61
"	" interest on balance of Jan'y 1, 1860		264 17
"	" market value 1-6 interest in 10 shares stock Mechanics' Bank		200 00
"	" market value of ¼ interest in 9 shares stock Bank of Commerce		450 00
			6,834 78
1862.			
Jan'y	1. By balance forward		6,834 78
"	" interest on balance of Jan'y 1, 1861		296 03
			7,130 81

207	1863.			
	Sept. 23.	To paid city taxes		10 20
		" " " "	4 45	
		" " express	5 43	
				9 88
				7,452 47
		Balance Jan'y 1, 1864		7,472 55
	1864.			
		Balance Jan'y 1, 1865		7,809 01
	1865.			
		Balance Jan'y 1, 1866		8,181 63
	1866.			
		Balance Jan'y 1, 1867		8,572 08
	1867.			
	May 24.	To amount which might have been realized this date from securities delivered to B. H. Micou, guardian, &c., viz:		
		Bond #17, E. Tenn. & G. R. R. Co		700 00
		" #631, city of Mobile		850 00
		2 " #3909 & 3910, city of New Orleans		1,850 00
		2 coupons " " (part due)		120 00
		3 bonds, #1098, #1126, #1488, city of Memphis		1,860 00
		4 " #36, #43, #101, and #109, city of Mobile		330 00
		To cash paid B. H. Micou, guardian		808 70
		Balance		2,642 07
				9,160 77

1863.			
Jan'y 1.	By balance forwards		7,130 81
	" interest on balance of Jan'y 1, 1862		341 74
			7,472 55
1864.			
Jan'y 1.	By balance forward		7,452 47
	" interest on balance of Jan'y 1, 1863		356 54
			7,809 01
1865.			
Jan'y 1.	By balance forward		7,809 01
	" interest on balance of Jan'y 1, 1864		372 62
			8,181 63
1866.			
Jan'y 1.	By balance forward		8,181 63
	" interest on balance of Jan'y 1, 1865		390 45
			8,572 08
1867.			
Jan'y.	By balance forward		8,572 08
	" interest on balance of Jan'y 1, 1866		409 08
May 24.	" interest to date		179 61
			9,160 77
1867.			
May 24.	Balance due		2,642 07

JAMES H. GILBERT, *Master, &c.*

Attest:

(Endorsed:) U. S. circuit court, southern district of New York. Mary J. C. Micou, as adm'x, &c., of Ann C. Sims, dec'd, vs. G. De Rosset Lamar, as ex'r, &c., of G. B. Lamar, dec'd. Master's statement of account of Gazaway B. Lamar, guardian. U. S. circuit court. Filed Dec. 17, 1880. Joseph M. Deuel, clerk.

208 DR. *Miss Ann C. Sims in ℅ with G. B. Lamar.* CR.

1856.			1856.		
Jan'y 1.	To paid for letters of guardianship	3 75	Jan'y 1.	By cash from Mrs. Abercrombie	5,166 80
Ap'l 10.	" " Mrs. Abercrombie	125 00		" her half of $100 of Mrs. Sims	50 00
	" " " "	1,555 03	Feb'y 11.	" ½ dividends Mechanics' Bank	150 00
	Balance January 1, 1857	5,271 38		" cash from Mrs. Abercrombie	1,555 03
			Oct. 1.	" ¼ dividends Mechanics' Bank	33 33
		6,955 16			6,955 16
1857.			1857.		
Jan'y 3.	To paid Mrs. Abercrombie	125 00	Jan'y 1.	By balance forward	5,271 38
July 1.	" " " "	125 00	May 20.	" ½ dividends Mechanics' Bank	20 00
	13. " " Dr. Green's services	15 00	June 11.	" ¼ interest (market value), 10 shares of stock of Mechanics' Bank	400 00
Dec. 31.	" " Mrs. Abercrombie	128 12			
	Balance January 1, 1858	5,298 26			5,691 38
		5,691 38			
1858.			1858.		
Jan'y.	To paid Mrs. Abercrombie	131 29	Jan'y 1.	By balance forward	5,298 26
July.	" " Dr. Green	12 00		" interest on balance January 1, 1857, at 6 ℅	316 28
	Balance January 1, 1859	5,471 29			5,614 54
		5,614 54			
1859.			1859.		
Jan'y.	To paid Mrs. Abercrombie	131 12	Jan'y 1.	By balance forward	5,471 29
March.	" cash to Mrs. Ann Sims	125 00		" interest on balance January 1, 1858	317 89
	" paid nurse	1 50			5,789 18
	" " passage to Savannah, &c	26 50			
	" " Rev. M. Abercrombie	115 85	1860.		
	Balance January 1, 1860	5,389 12	Jan'y 1.	By balance forward	5,389 21
		5,789 18		" interest on balance of January 1, 1859	328 27
1860.			March 26.	" ½ B. A. Major's note collected	491 16
Feb'y.	To paid cash to Mrs. Sims	125 00			6,208 64
	Balance Jan'y 1, 1861	6,083 64	1861.		
		6,208 64	Jan'y 1.	By balance forward	6,083 64
				" interest on balance of January 1, 1860	323 35
	Balance January 1, 1862	7,056 99		" market value of ¼ interest in 10 shares stock Mechanics' Bank	200 00
		7,056 99		" market value of ½ interest in 9 shares stock Bank of Commerce	450 00
					7,056 99
	Balance January 1, 1863	7,422 00	1862.		
			Jan'y 1.	By balance forward	7,056 99
				" interest on balance of January 1, 1861	365 01
		7,422 00			7,422 00

1863.		
Sept. 23. To paid city taxes		10 20
" " "	4 45	
express	5 43	
		9 88
Balance January 1, 1864		7,825 33
		7,845 41
Balance January 1, 1865		8,270 33
		8,270 33
Balance January 1, 1866		8,739 84
		8,739 84
Balance January 1, 1867		9,236 06
		9,236 06
1867.		
May 24. To amount which might have been realized this date from securities delivered to B. H. Micou, guardian, &c., viz:		
Bond No. 17, E. Tenn. & G. R. R Co		700 00
12 past-due coupons attached to bond No. 17, E. Tenn. & G. R. R. Co.		252 00
Bond No. 631, city of Mobile		850 00
2 " Nos. 3909 & 3910, city of New Orleans		1,850 00
2 coupons " " (past due)		120 00
3 bonds Nos. 1096, 1126, 1488, city of Memphis		1,860 00
36 past-due coupons attached to bonds 1096, 1126, 1488, of the city of Memphis		669 61
4 bonds Nos. 36, 43, 101, & 109, city of Mobile		330 00
To cash paid B. H. Micou, guardian		808 70
" commissions		302 56
Balance		2,247 84
		9,990 71
1881.		
May 21. To balance		4,416 46
		4,416 46

1863.		
Jan'y 1. By balance forward		7,422 00
" interest on balance of January 1, 1862		423 41
		7,845 41
1864.		
Jan'y 1. By balance forward		7,825 33
" interest on balance of January 1, 1863		445 00
		8,270 33
1865.		
Jan'y 1. By balance forward		8,270 33
" interest on balance of January 1, 1864		469 51
		8,739 84
1866.		
Jan'y 1. By balance forward		8,739 84
" interest on balance of January 1, 1865		496 22
		9,236 06
1867.		
Jan'y 1. By balance forward		9,236 06
" interest on balance of January 1, 1866		524 39
		9,760 45
" balance due		230 26
" interest to date		
		9,990 71
1867.		
May 24. By balance forward		2,247 71

	Y'rs.	M's.	D's.	
1880.				
Jan'y 1. " interest from May 24, '67, to date, at 7 %,	12	7	6	1,982 59
1881.				
May 21. " " " Jan'y 1, '80, " " " 6 %,	1	4	21	186 03
				4,416 46
1881.				
May 21. By balance due to date				4,416 46

(Endorsed:) U. S. circuit court, southern dist. of New York. Mary J. C. Micou, as adm'x, &c., of Ann C. Sims, dec'd, vs. G. De Rosset Lamar, as ex'r, &c., of G. B. Lamar. Amended account of Garaway B. Lamar, g'd'n. Nash & Holt, compl't's solicitors, 51 William st., N. Y.

Due service of a copy of the within account is hereby admitted this 21st day of May, 1881.

DICKERSON & BEAMAN, *Def't's Solicitors.*

May 21, '81. U. S. circuit court. Filed May 23, 1881. Joseph M. Deuel, clerk.

209½ U. S. circuit court, southern district of New York.

MARY J. C. MICOU, ADM'X, &C., OF ANN C. Sims, deceased,
vs.
G. DE ROSSET LAMAR, EXECUTOR, &C.

The plaintiff excepts as follows to the report of the master herein, filed December 17, 1880:

1. That the rate of interest charged on balances in the account as stated is five per cent.; whereas by the law of the State of New York, as declared by its court of appeals, which the plaintiff respectfully insists is obligatory upon this court in this case, such rate of interest should have been six per cent. at least until January 1, 1880, the date at which the legal rate of simple interest in New York was changed from seven to six per cent.

2. That the guardian was credited in said account for certain sums, amounting in all to $5,710, for certain securities delivered on
210 May 24, 1867, to B. H. Micou; whereas the original investment by said guardian of his ward's estate in said securities and the continuation thereof having been at all times illegal, the said guardian was not entitled to any credit whatever therefor.

Dated January 15, 1881.

NASH & HOLT,
Solicitors for Complainant.

(Endorsed:) U. S. circuit court, southern district of New York. Mary J. C. Micou, adm'x, &c., of Ann C. Sims, dec'd, vs. G. De Rosset Lamar, ex. Plaintiff's exceptions to report of master. Nash & Holt, solis. for compl't, 51 William st., N. Y. U. S. circuit court. Filed Jan. 17, 1881. Joseph M. Deuel, clerk.

211 U. S. circuit court, southern district of New York.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., of Ann C. Sims, dec'd, complainant,
against
G. DE ROSSET LAMAR, AS EX'R OF THE LAST will & testament of Gazaway B. Lamar, dec'd, defendant.
} In equity.

Exceptions taken in behalf of the defendant to the report of James H. Gilbert, esq., a commissioner of this court, and appointed as special master herein, such report having been filed in the office of the clerk of this court on the 17th day of December, 1880.

FIRST EXCEPTION.—For that the said master has found and reported that at the time of the appointment of the said Gazaway B. Lamar as her guardian the said Ann C. Sims, as next of kin of her de-
212 ceased, father, had an equal undivided third interest in ten shares of stock of the Mechanics' Bank of Augusta, in the State of Georgia; whereas the said master should have found and reported that it was not proven that the said Ann C. Sims had any interest at that time, or at any time, in said ten shares of stock, as the evidence showed that at that time the said stock stood in the name of her mother, Mrs. Abercrombie, as administratrix of her father, W. W. Sims, and it

was not proven that the administration of his estate was ever closed and distribution made thereof.

SECOND EXCEPTION.—For tl at the said master has found and reported that the aforesaid interest of the said Ann C. Sims in said ten shares of stock of the Mechanics' Bank of Augusta, in the State of Georgia, was by the death of her mother increased and became an equal undivided half interest in the said stock, on or before the 1st day of July, 1859; whereas the said master should have found
213 and reported that it was not proven that the said Ann C. Sims, had any interest in said stock on or before the 1st day of July, 1859, or at any other time, as it was not proven that her mother before her death finally administered upon the estate of her father, or that after the death of her mother any one ever administered upon her mother's estate, or upon the estate of her father, W. W. Sims, or that distribution was ever made of either of said estates.

THIRD EXCEPTION.—For that the said master has found and reported that the said Ann C. Sims, on or before the 1st day of July, 1859, as next of kin of her deceased mother, and by virtue of a renunciation executed by the husband of her mother, became entitled to one equal undivided half interest in nine shares of stock of the Bank of Commerce of Savannah, in the State of Georgia; whereas the said master should have found and reported that it was not proven that
214 the said Ann C. Sims, on or before the said 1st day of July, 1859, or at any other time, became entitled to any interest whatever in said shares of stock, as it was proven that during the life of her mother said shares of stock belonged to her, and it was not proven that after her death her estate was ever administered upon or distribution thereof made, and it was proven that no renunciation of his interest in said estate was ever executed by her father except to take effect at his death, which death was not proven to have taken place.

FOURTH EXCEPTION.—For that the said master, having failed to find and report whether the said Lamar might by due diligence have collected any interest of the said Ann C. Sims in the said stock of the Mechanics' Bank of Augusta, Georgia, or in the said stock of the Bank of Commerce of Savannah, has nevertheless charged the said Gazaway B. Lamar in his account with the market value
215 of such interest, at the times respectively at which he has found that the said Lamar might have collected the said interests respectively; whereas the said master should have found that the said Lamar could not by due diligence have collected the said interests in said stocks, and should not, therefore, have charged the said Lamar in account with the market value of such interests at any time, for the reason that the diligence due from him as such guardian did not require that he should collect the said interests under the existing circumstances, and be accountable for the value thereof in case of failure so to collect them.

FIFTH EXCEPTION.—For that the said master has failed to report what the said Benjamin H. Micou might have realized on or about the 24th of May, 1867, from the twelve past-due coupons attached to bond number 17, for a thousand dollars, of the East Tennessee & Geor-
216 gia Railroad, but has found that they could not then be collected; whereas the master should have found and reported either that the same might then have been collected, and were worth three hundred and sixty dollars, it being stipulated in the proofs that on the 1st day of July, 1867, the coupon on said bond falling due on that day, and amounting to thirty dollars, would, if presented, have been paid by said

railroad, and that the similar coupons for every half year's interest thereafter falling due would, if presented, have been so paid.

Or the said master should have found that the said Micou might have realized therefrom on said 24th of May, 1867, the same percentage value as the master, upon the admitted state of facts, has found the said Micou could have realized from the bond itself, viz, 70 per cent., or upon said coupons two hundred and fifty-two dollars.

217 SIXTH EXCEPTION.—For that the master has failed to report what the said Benjamin H. Micou might have realized on or about the 24th of May, 1867, from the thirty-six past-due coupons of bonds Nos. 1096–1126 and 1488 of the city of Memphis, but has found that they could not then be collected; whereas the said master should have found and reported either that the same might then have been collected and were worth ten hundred and eighty dollars, it being stipulated in the proofs that on the 1st day of July, 1867, the coupons falling due on that day on said three bonds, amounting to ninety dollars, would, if presented, have been paid by the city of Memphis, and that the similar coupons for every half year's interest on said bonds thereafter falling due would, if so presented when due, been paid.

Or, the master should have found that the said Micou might have realized therefrom at such time the same percentage value as the

218 master on the agreed state of facts has found the said Micou could have realized from the bonds themselves, viz, sixty-two per cent., or upon said coupon six hundred and sixty-nine dollars and sixty-one cents.

SEVENTH EXCEPTION.—For that the master having found that the said twelve past-due coupons on said bond No. 17 of the East Tennessee and Georgia Railroad might have been collected on or about the 24th day of May, 1869, and would have then realized the sum of three hundred and sixty dollars, and having also found that the said thirty-six coupons on said bonds, Nos. 1096, 1126, and 1488 of the city of Memphis, might have been collected on or about the 24th day of May, 1869, and would then have realized the sum of one thousand and eighty dollars, has failed to credit the said account of the said Lamar in any way with the value of any of said coupons on said 24th day of

219 May, 1869, or at any time; whereas, he should have so credited his account either with the full value on May 24, 1869, or with their present worth on the 24th of May, 1867, such present worth to be ascertained by dividing the face-value thereof by one dollar and fourteen cents, it being stipulated in the proofs that the amount of the twelve past-due coupons attached to the said bond No. 17, which, on the 24th of May, 1867, were delivered to said guardian with said bond might have been collected from said railroad, and said Micou, as guardian, might have realized therefrom on or about the 24th of May, 1869, the sum of three hundred and sixty dollars, and it being further stipulated that the amount of the thirty-six past-due coupons, which, on the 24th day of May, 1867, were delivered to said guardian with said last-mentioned three bonds of the city of Memphis, might have been collected from said city of Memphis and said Micou as guardian as aforesaid on or about the said 24th day of May, 1869, might have

220 realized therefrom the sum of one thousand and eighty dollars.

EIGHTH EXCEPTION.—For that the said master has found and reported the highest market value of the securities mentioned in said interlocutory decree, and delivered to the said Micou on the 24th of May, 1867, but has, nevertheless, failed to credit, as he should have done, the said account with such highest market value at such time,

and has also failed to credit said account, as he should have done, with the par value as they became due of all coupons upon said securities coming due between the said 24th day of May, 1867, and the time at which the said securities respectfully were found by him to have been at their highest market value.

NINTH EXCEPTION.—For that the said master has found and reported that the amount for which the said Lamar was account-
221 able on the 24th day of May, 1867, was two thousand six hundred and forty-two dollars and seven cents; whereas he should have found that he was on that day accountable for a less sum or for no sum.

TENTH EXCEPTION.—For that the master having found and reported the legal commissions of the said Gazaway B. Lamar upon the said estate has not properly charged the said estate therewith, viz, $316.59.

ELEVENTH EXCEPTION.—For that the master having found that the said Gazaway B. Lamar could not have collected the interest of Ann C. Sims in the stock of the said Mechanics' Bank and the said Bank of Commerce without cost to the estate of his said ward has failed to find what that cost was or to make any charge to the estate therefor.

New York, Jan. 15, 1880.

DICKERSON & BEAMAN,
Solicitors for Defendants.

222 (Endorsed:) U. S. circuit court. Mary J. C. Micou, as administratrix of Ann C. Sims, dec'd, vs. G. De Rosset Lamar, as ex'r of Gazaway B. Lamar, dec'd. Exceptions in behalf of def't to report of master. U. S. circuit court. Filed Jan. 15, 1881, Joseph M. Deuel, clerk.

223 U. S. circuit court, so. dist. N. York.

MARY J. C. MICOU, ADMIN'X OF ANN C. SIMS, deceased,
vs.
G. DE ROSSET LAMAR, EXEC'R, &C.

CHOATE, J.:

In this case the complainant having a decree for an accounting, the case comes up again upon exceptions to the master's report.

The first point raised by the defendant is that the master improperly charged the defendant in the case of each of the infants with the value of one-third of ten shares in the stock of the Mechanics' Bank of Augusta, in the State of Georgia. The evidence is that these shares formerly belonged to W. W. Sims, the father of the infants, who died in 1850; and that at the time of the appointment of defendant's testator as guardian they stood on the books of the bank in the name of
224 Mrs. Abercrombie, the widow of said W. W. Sims, as his administratrix.

From February, 1856, to February, 1859, defendant's testator, as guardian of each of the infants, received from the bank one-third of the dividends on these ten shares, and thereafter, from the death of their mother, Mrs. Abercrombie, until the war, when the stock became worthless, he received from the bank, as guardian of each of the infants, one-half of said dividends.

It appears by a memorandum in the guardian's account that in January, 1856, the guardian applied to the bank for a transfer to him as guardian of the infants of the one-third of the ten shares, but that the

bank, though willing to pay the dividends, and continuing thereafter to do so, as above stated, refused to make a transfer of the stock itself.

I think it is a proper inference from this evidence that the real
225 beneficial interest in one-third of these ten shares was in each of the infants after the death of their father. The great lapse of time since his death, and the absence of any evidence that the property was needed for payment of his debts, warrant the conclusion that the guardian could, upon requesting it of Mrs. Abercrombie, the administratrix, have had the estate so far settled as to have procured a transfer of the infant's interest to him as guardian. It is argued that the guardian was under no obligation to reduce property of this kind, belonging to his ward in another State, to his possession; that the office of guardian is local, and as to property out of the State under whose laws he holds his appointment, he is only chargeable with that of which he actually takes possession. I cannot subscribe to this doctrine. I think it is the duty of the guardian to take into his pos-
226 session, so far as he is able, the estate of his ward, wherever it may be, and that he is not to be justified in abandoning any part of it because it happens to be outside of the jurisdiction of the State wherein he is appointed. It is objected, however, that the laws of Georgia interposed an obstacle to prevent the guardian from reducing this stock to possession and removing it from the State, or selling it and investing the proceeds as required by the law of New York. There was a short period from the spring of 1859 to January, 1860, when the infants resided in Georgia with their relatives. After that they resided in Alabama; and before that, from shortly after the appointment of the guardian till the spring of 1859, when their mother, Mrs. Abercrombie, died, they resided in Connecticut with their mother. It appears that by the law of Georgia a foreign guardian cannot remove property within the State belonging to his ward without
227 the consent of the ordinary. The matter appears to be committed to the discretion of the ordinary. I cannot conceive of any reason why the ordinary should refuse his consent unless it were during the brief period that the ward resided in that State. It does not appear that in this case the guardian ever applied for his consent; and the burden being on the guardian to show that he could not get possession of the property and invest it as required by the terms of his appointment, I think the defendant has failed to sustain that burden, or to show that there was any obstacle growing out of the laws of Georgia which prevented his getting possession of the stock and investing it properly. It is also claimed by defendant that he should be allowed a deduction from the value of this stock for the expense
228 that would be necessarily incurred in reducing it to possession. There is no proof what the expense would be, or that it would be more than nominal. It is not to be presumed that the mother of the wards would have interposed any difficulties, or that the guardian would have been charged with any expenses in obtaining a transfer of the stock. The defendant was therefore properly charged with this item.

The next question is whether the master properly charged the defendant, in the case of each infant, with one-sixth of the value of these same shares of stock, and with one-half of the value of nine shares of the stock of the Bank of Commerce, a Georgia corporation. These stocks belonged to Mrs. Abercrombie, the mother of the wards, in her life-time; one-third interest in the ten shares of the Mechanics' Bank came to her from her husband, W. W. Sims, and the ten shares

229 stood in her name as his administratrix, as above stated. The nine shares were purchased by her and stood in her name till her death, in the spring of 1859. On her death, her husband, Mr. Abercrombie, became entitled to her personal property. The title of each of the wards in one-half of their mother's interest in these two lots of stock is derived through what is claimed to have been a surrender by Mr. Abercrombie to her two children of their mother's interest in the same. The evidence that such a surrender or transfer was made is chiefly a letter of the guardian to the grandmother of the two children, dated May 23, 1859, soon after the death of Mrs. Abercrombie, their mother, and the acts of the parties, in apparent conformity with what the letter shows had been done by Mr. Abercrombie in respect to such a surrender. In this letter defendant's testator says:

230 "You were informed through Mary Jane that Rev. Mr. Abercrombie had offered to surrender the property he acquired through Mrs. Sims, and which had belonged to her former husband, to the two children. Subsequently he made a transfer, to take effect at his death, and two notes, one to each of the girls, payable six months after his death, for $2,750 each. Again he changed his mind, and offered to make a surrender at once, and gave me deeds to two three-story houses in Brooklyn, E. D., seventeen feet only, and subject to $4,500 mortgage on each, with last year's taxes and some arrears for repairs, and only one house tenanted, at $550 rent. After inspecting the houses and taking the opinion of a judicious friend, which confirmed my own, I thought it best to decline the proposition in that shape and hold on to the

231 notes, $2,750 each, though insecured, because the encumbrances on the property might entail more outlay than income for the children. This morning I have a letter from him without any further proposition, which I hoped he would have made; so that I retain the two notes and a transfer of all his interest derived through his wife to the balance of the estate. This will enclude her one-third part of the ten shares Mechanics' Bank stock, and nine shares of the Bank of Commerce, and her third of the notes received for the Florida lands. I hope the children are improving, &c. * * * Their income is limited without the notes of Rev'd Mr. A., & those for the land to between $500 and $600 each, so long as the banks continue to pay regular dividends as they have done." From the date of that letter defendant's testator charged himself in his account, as guardian, with the re-

232 ceipt of the dividends on the said one-third of the ten shares Mechanics' Bank, and on the nine shares Bank of Commerce, one-half in the account with each of the wards. Among the assets and papers transferred by the defendant's testator to Mr. Micou upon the appointment of the latter as guardian, in 1867, as appears by the receipt of Mr. Micou given therefor, are the following: "The conveyance of Richard M. Abercrombie, dated 10th of May, 1859, of all he then had or might have in the estate of W. W. Sims, in right of his late wife, then deceased;" "two notes, each for $2,750, dated April 15, 1859, of the said Rev. Richard M. Abercrombie, payable six months after his decease, without interest;" "No. 136 Bank of Commerce certificate for nine shares stock for Mrs. M. C. Abercrombie, 8th July, 1857."

233 I think it is a fair inference from the letter, the recitals of Mr. Micou's receipt, and the continued collection of the dividends by the guardian, that Mr. Abercrombie made an immediate surrender to the guardian of his wife's interest in the ten shares of Mechanics' Bank stock and the nine shares Bank of Commerce stock; without these

other circumstances the letter might have been taken to imply that his surrender of these stocks was to take effect only at his death; but, in the light of these circumstances, which strongly tend to show that a present surrender, at least of these two pieces of property, was made, I think the conclusion of the master was correct, that defendant's testator could, by proper effort on his part, have reduced these stocks to his possession. It is true that to do so, and to vest the legal title
234 in the guardian, it would have been necessary for some one to have taken out letters of administration on the estate of W. W. Sims, and also on the estate of Mrs. Abercrombie; but it is not to be presumed, in the absence of evidence, that this could not have been done. Nor do the circumstances tend to show that this property was needed to pay the debts of Mrs. Abercrombie. Such a supposition is inconsistent with the terms of the letter of Mr. Lamar. It appeared that Mr. Abercrombie is living, and he was not called as a witness. There was at least prima facie evidence that the guardian had under his control, and so within his reach that he could have reduced them to possession, these two lots of stock formerly belonging to the mother of his wards; and his failure to call Mr. Abercrombie to show that the surrender of them was not immediate, if that was the fact,
235 does not aid his case. The same suggestions relative to the expense of obtaining possession of these stocks, and relative to any difficulty growing of the laws of Georgia, apply to these items as to the interest of the ward in the one-third of the ten shares Mechanics' Bank derived from her father.

The next question raised is whether the defendant's testator should receive any credit for past-due coupons on one bond of the East Tennessee, Virginia & Georgia Railroad, and on three bonds of the city of Memphis, which were among the securities turned over to Mr. Micou, the new guardian. It is insisted by the plaintiff that there is no evidence that at the time they were so transferred they had any value. It appears that about two years thereafter they became collectable I think, however, there is evidence that they had value at the
236 time of the transfer, and this is the agreed fact, that the bonds to which they belonged were then worth a certain per cent. of their face. In the absence of any evidence affecting the validity of these overdue coupons, I think it may safely be assumed they were worth at least an equal percentage of their face value. It is to be presumed that they have the same security for their payment as the principal of the bond, with the added advantage of being already due, a circumstance which attaches to the possession of them remedies which the bonds themselves may not have carried with them. I think, therefore, the defendant's claim for this credit is reasonable, and should be allowed. I see no reason whatever for allowing a credit for the securities turned over to the new guardian at the highest rate at
237 which they could at any time afterwards have been sold, & the exception, on the ground that such allowance was not made, must be overruled.

The circumstances of this case are not such that the guardian should be refused his commissions. If he accounts fully for all the estate of his ward, the plaintiff gets a full indemnity, though the commissions are allowed. There was no wilful misconduct on the part of the guardian (King vs. Talbot, 40 N. Y. 96).

The remaining questions submitted relate to the rate of interest and the mode of computing it. This matter was somewhat considered upon the settlement of the interlocutory decree, and the master was directed

to compute interest at the rate of five per cent., with annual rests, the rate being fixed at the uniform rate of one per cent. less than the
238 present legal rate of interest in this State. I think, however, there is good reason to discriminate as to the rate of interest between the period of the guardianship and the period subsequent thereto. The guardianship of one of the infants terminated in 1867, on her death; that of the other in 1872, on her attaining her majority. In both cases the guardianship terminated long before the legal rate of interest in this State was reduced from seven per cent. to six per cent. The rate of interest with which a trustee should be charged during the period of the trust under similar circumstances was very carefully considered by the court of appeals in the case of Talbot vs. King, ut supra, and it was fixed at six per cent., or one per cent below the legal rate of interest in this State. If that decision is not binding on this court, it is entitled to
239 very great consideration and should, I think, be followed, and the change made in the legal rate so long after the termination of these guardianships does not affect the question of the rate during the period of the guardianship. During the guardianships the account is to be taken with annual rests. But with respect to the period subsequent to the termination of the trust a different principle applies. The wards having rejected the investments made by the guardian, and demanded the equivalent in money of what would have been a proper investment, the rate of interest with which he is to be charged during the period of the guardianship is that which with proper and safe investments he might have realized, and therefore less than the current legal rate as explained in the case of Talbot v. King above re-
240 ferred to. From the termination of the guardianship, however, in the position assumed by the wards of resisting the investments, the liability of the guardian was simply to pay over a certain sum of money. His duty was not to invest it or to keep it invested, but to pay it to the wards or their legal representatives on demand.

It was due presently, and like other moneys due presently carries interest without annual rests at the rate fixed by law therefor. The guardian could have relieved himself at any time by payment. The wards could have had their money at any time on demand. As to this period, therefore, there is no reason for computing the account with annual rests, nor for charging a less rate than the legal rate of interest, which was seven per cent. down to January 1, 1880, and six per
241 cent. from that date to the present time. Other questions which might have been raised upon the exceptions as drawn have not been presented on the argument, and as I understand it are not now insisted upon.

Let a decree be entered into in conformity with this opinion.

Geo. C. Holt, for compl'ts.

C. C. Beaman, jr., for def't.

MAY 5, 1881.

(Endorsed:) Micou vs. Lamar. Decision. Choate, J. U. S. circuit court. Filed May 6, 1881. Joseph M. Deuel, clerk.

242 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, in the said district, on the 21st day of May, 1881.

Present, Hon. William G. Choate, judge.

MARY J. C. MICOU, AS ADMINISTRATRIX, with the will annexed, of the goods, chattels, and credits which were of Ann C. Sims, deceased, complainant,
vs.
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased, defendant.
} In equity.

This cause having came on to be heard, upon the report of James H. Gilbert, esq., a commissioner of this court, to whom it was referred as master by an interlocutory decree in this cause entered
243 February 9th, 1880, to take an account of the estate of Ann C. Sims which came to the hands of Gazaway B. Lamar, as her guardian, as in the bill of complaint stated, or which, without his default, might have so come to his hands, which report bears date December 13, 1880, and also upon exceptions taken to said report on the part of said defendant and also on the part of said complainant; and the said cause having been argued by Geo. C. Holt, esq., of counsel for complainant, and by Charles C. Beaman, jr., esq., of counsel for defendant, and due deliberation having been had thereon—

It is ordered, adjudged, and decreed, and this court, by virtue of the power and authority there invested, doth order, adjudge, and decree, that each and every exception of said defendant to said master's report except the fifth, sixth, seventh, and tenth exceptions of defendant be and hereby are overruled, and that the said fifth, sixth, seventh, and tenth exceptions of defendant be and hereby are allowed in part, that is to say, that the said guardian have credit in said account under date of May 24, 1867, for $252 as the value of twelve past-due coupons attached to bond 17 of the East Tennessee Railroad Company, and
244 for $669.61 as the value of thirty-six past-due coupons attached to bonds 1096, 1126, and 1488 of the city of Memphis, delivered by said guardian to B. H. Micou, May 24, 1867, and that the legal commissioners of said Gazaway B. Lamar, as guardian of said Ann C. Sims, be allowed and charged to said estate in said account as finally stated; that the complainant's exception to said master's report be and hereby is allowed in part, that is to say, that the said account be taken with annual rests with interest at six per cent. per annum instead of at five per cent. per annum, and in other respects as provided in said interlocutory decree down to May 24, 1867, the date on which said Gazaway B. Lamar ceased to act as guardian, and that upon the balance due from said guardian on said May 24, 1867, simple interest be charged to the date of this decree as prescribed by the law of New York, to wit, seven per cent. from said May 24, 1867, to January 1, 1880, and six per cent. thereafter, and that the said master's report and the account as stated by said master, except in so far as the same have been modified by the foregoing provisions of this decree, be and the same hereby
245 are in all respects approved and do so stand confirmed.

And it is further ordered, adjudged, and decreed that the amount for which the defendant, as executor of the will of Gazaway B. Lamar, is accountable to the complainant is the sum of four thousand four hundred and sixteen dollars and forty-six cents, as appears by the said account as amended and restated so as to comply with the foregoing provisions of this decree and filed herewith, and that said complainant Mary J. C. Micou, as administratrix, with the will annexed, of the goods, chattels, and credits of Ann C. Sims, deceased, recover of G. De Rosset

Lamar, as executor of the will of Gazaway B. Lamar, deceased, said sum of four thousand four hundred and sixteen dollars and forty-six cents, together with two hundred and sixty dollars and seventy-seven cents, complainant's costs as heretofore taxed herein, amounting in all to four thousand six hundred and seventy-seven dollars and twenty-three cents, to be levied and collected of the goods, chattels, and credits of said Gazaway B. Lamar in the hands of said G. De Rosset Lamar, as such executor, to be administered.

WM. G. CHOATE.

246 (Endorsed:) U. S. circuit court, southern dist. of New York. Mary J. C. Micou, adm'x, &c., of Ann C. Sims, dec'd, vs. G. De Rosset Lamar. Decree. Nash & Holt, sol'r for compl., 51 William st. N. Y.

We approve of the within decree as to form.

DICKSON & BEAMAN,
Def't Counsels.

MAY 21, 1881.

U. S. circuit court, filed May 23, 1881. Joseph M. Duel, clerk. Copy.

247 U. S. circuit court, southern district of New York.

MARY J. C. MICOU, ADMINISTRATRIX, &C., OF Ann C. Sims,
vs.
G. DE ROSSET LAMAR, EXECUTOR, &C.

MARY J. C. MICOU, ADMINISTRATRIX, &C., OF Martha M. Sims,
vs.
THE SAME.

Upon the proceedings already taken herein, and upon the affidavit of Charles C. Beaman, jr. sworn to the 11th day of July, 1881, and on service on the plaintiff's solicitors of a copy of said affidavit, and of this order on the plaintiff's solicitors, the same shall be regarded as notice of a motion to be made before this court, at the United States court-rooms, in the post-office building, New York City, on the 26th day
248 of July, 1881, at 12 o'clock m., that the final decree entered herein on the 21st day of May, 1881, be amended in such a way that the value of the securities turned over by Gazaway B. Lamar, guardian, on the 27th day of May, 1867, to Benjamin H. Micou, as guardian of Ann C. Sims, be credited as so much turned over in behalf of his wards, Martha M. Sims and Ann C. Sims, equally, instead of being credited as so much turned over in behalf of his ward Ann C. Sims alone, and meanwhile, and until the determination of the court thereon, let the execution be stayed in both of the above suits; and let the defendant's solicitors forthwith serve upon the plaintiff's solicitors a copy of this order, and of the said affidavit of Charles C. Beaman, jr.

SAM'L BLATCHFORD.

Dated July 13th, 1881.

(Endorsed:) U. S. circuit court, southern district of N. Y.
249 Mary J. C. Micou, administratrix, &c., of Ann C. Sims, vs. G. De Rosset Lamar, executor, &c. Mary J. C. Micou, administratrix, &c., of Martha M. Sims, vs. The Same. Order. Dickerson & Beaman, def'ts' solicitors. U. S. circuit court. Filed July 13, 1881. Josèph M. Deuel, clerk.

250 U. S. circuit court, southern district of New York.

MARY J. C. MICOU, ADMINISTRATRIX, &C., OF Ann C. Sims,
vs.
G. DE ROSSET LAMAR, EXECUTOR, &C.

MARY J. C. MICOU, ADMINISTRATRIX, &C., OF Martha M. Sims,
vs.
THE SAME.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles C. Beaman, jr., being duly sworn, deposes and says:

I am an attorney and counselor at law, and formerly of the firm of Dickerson & Beaman, who were and are the solicitors of record for the defendants in the above-entitled suits, and I have been familiar with the above-entitled suits, and have had especial charge of the matters before the master therein.

251 In 1855 Gazaway B. Lamar was appointed the guardian in Richmond County, State of New York, of two sisters, Martha M. Sims and Ann C. Sims. Martha M. Sims was the elder, and died on or about November 2, 1864, unmarried and without leaving a will, and leaving her sister, Ann C. Sims, her next of kin. Ann C. Sims became of age in 1872, and died about the 7th day of May, 1876. The above two suits are now in the name of Mary J. C. Micou, as administratrix of the goods & chattels of Martha M. Sims, and as executrix of the last will and testament of Ann C. Sims, and the defendant is the executor of Gazaway B. Lamar.

Mr. Gazaway B. Lamar during his lifetime having received the same sum for each child invested the same, sometimes in bonds or stock for the two jointly, and sometimes purchased bonds or stocks for each separately. When Martha M. Sims died, he paid over the income from her property to her sister, Ann C. Sims, and in 1867, when he turned

252 over to Benjamin H. Micou, who in Alabama had been appointed guardian of Ann C. Sims, he turned over all the investments that he had made both for Ann C. Sims, and for Martha M. Sims, as will appear by the papers and receipts in the case. Certain of this property consisted of various securities which had been bought on account of the two Misses Sims by Mr. Lamar in New York, in 1862, with the proceeds of certain stock of the Bank of the Republic of New York, which stock had been held for the two Miss Sims.

The value of these securities on the 24th day of May, 1867, the date on which they were turned over, has been found by the court to have been $6,631.61. In the decrees that have been entered in these two suits the sum has been credited as so much paid by Mr. Lamar to Ann C. Sims, on account of money he had received as her guardian, whereas the papers clearly show that it was intended by him as a payment to her guardian of what he, Mr. Lamar, had received as her guar-

253 dian, and also of what he had received as guardian of her dead sister Martha M. Sims, and which was due to her, Ann C. Sims, as next of kin. Nowhere in the proceedings before the court or before the master was any exception taken in behalf of the defendant to this manner of crediting the value of the property so turned over, because as long as credit was given for the value of the property paid over, it did not occur to the defendant or to his counsel that it made any dif-

ference in the progress of the litigation or in the amount that might be decided finally to be due, and until the final determination by the court it was of course unknown what the amount due in each case would be. Judgment was entered in the two suits the 21st of May, 1881. In the suit in which the estate of Ann C. Sims is plaintiff for $4,697.13, & in the suit in which the estate of Martha M. Sims is plaintiff in the sum of $18,957.82. These two suits have in effect by both parties been always considered as one and the same suit, having been tried together and heard on the same testimony.

254 Mr. Lamar, as already stated, received the same sum for each of these wards in 1855, and the reason why there is any difference in the amounts to be recovered by the two estates now is simply because Mr. Lamar has received from the estate of Martha M. Sims credit for what he turned over to her guardian, as so much paid to her on account of his guardianship, whereas it was understood and intended by Mr. Lamar and by the new guardian as a settlement both of Mr. Lamar's accounts as guardian for Martha M. Sims and for Ann C. Sims.

The defendant, under the advice of his counsel, purposes, and has purposed ever since the interlocutory decree herein, to appeal these suits to the Supreme Court of the United States, and now, when his counsel are taking steps to do so, a question has arisen whether the suit in which the estate of Ann C. Sims as plaintiff can be appealed by reason of the fact that the actual money judgment is for less than $5,000.

255 In the opinion of the defendant's counsel, there is some reason to hold that the smaller suit is so connected with the larger suit, both in its fact and in its judgment, and by reason of the cross-bills, that an appeal ought to be allowed in the smaller suit, even though the amount of the judgment is less than $5,000.

But this question is not free from difficulty, and however decided by the court below, might necessitate ultimate decision therein by the Supreme Court of the United States. They have therefore advised their client, with the purpose of avoiding delays incident to a decision of such a question, and in the furtherance of justice, that he should apply to the court for an amendment to the final decree herein in such a way that the said sum of $6,631.61 should be credited as having been paid by Mr. Lamar in equal parts to the estates of Martha M. Sims and Ann C. Sims, instead of to the estate of Ann C. Sims alone. Such a correction of the judgment would in no way diminish the total amount of the two judgments, and under the provisions of the will of Ann C. Sims, Mary J. C. Micou, the aunt of the Misses Sims and the

256 plaintiff in both suits, is entitled to whatever may be recovered in both of these suits, so that the plaintiff would be prejudiced in no way, being in fact the same person.

Such amendment would be carrying out the undoubted intention of all parties at the time the securities were turned over by Mr. Lamar, and would enable the judgments to be so modified that in the two suits the amount of the judgment would be nearly equal. In case of an appeal, the defendant purposes to deposit with the court abundant security, so that in no way would the rights of the plaintiffs be injured, or liable to injury, whereas if the amendment is not made it might happen that the injury done to the defendant would be serious and irreparable.

CHARLES C. BEAMAN, JR.

Sworn to before me this 11th day of July, 1881.
[L. S.] THOMAS T. SHERMAN,
Notary Public, Westchester Co., with cert. in N. Y. Co.

(Endorsed:) U. S. circuit court, southern dist. of New York.
257 Mary J. C. Micou as administratrix, &c., vs. G. De Rosset Lamar, ex'r, &c. Affidavit & order. Dickerson & Beaman, def't's solicitors.

Due service of the within affidavit and order is hereby acknowledged.
July 19, 1881.
NASH & HOLT,
Compl't's Sol'rs.

U. S. circuit court. Filed July 22, 1881. Joseph M. Deuel, clerk.

258 U. S. circuit court, southern district of New York.

MARY J. C. MICOU, ADMINISTRATRIX, &C., OF Ann C. Sims,
vs.
G. DE ROSSET LAMAR, EXECUTOR, &C.

MARY J. C. MICOU, ADMINISTRATRIX, &C., OF Martha M. Sims,
vs.
THE SAME.

To the honorable judge of the circuit court of the United States, for the southern district of New York:

Your petitioner, G. De Rosset Lamar, respectfully represents that he is the defendant in each of the above suits, and the executor of Gazaway B. Lamar, therein referred to.

That in 1855, Gazaway B. Lamar was appointed the guardian, in Richmond County, State of New York, of two sisters, Martha M. Sims and Ann C. Sims; that Martha M. Sims was the elder, and died
259 on or about November 2, 1864, unmarried and without leaving a will, and leaving her sister Ann C. Sims her next of kin; that Ann C. Sims became of age in 1872, and died about the 7th day of May, 1876; that the above two suits are now, the first in the name of Mary J. C. Micou, as executrix of the last will and testament of Ann C. Sims, and the second in the name of Mary J. C. Micou as administratrix of the goods and chattels of Martha M. Sims, and the defendant in each suit is the executor of Gazaway B. Lamar, and the two suits have been tried upon the same agreed statement of facts from which it appears that Gazaway B. Lamar during his life-time having received the same sum for each of the Misses Sims invested the same, sometimes in bonds or stock for the two jointly, and sometimes purchased bonds or stocks for each separately; and that after Martha M. Sims died he paid over, from time to time, the income from her property to her sister Ann C. Sims, and in 1867, when he turned over certain property to Benjamin H. Micou, who, in Alabama, had been appointed guardian of Ann C. Sims, he turned over all the property that he had, both of or for
260 Ann C. Sims, and of or for Martha M. Sims. Certain of this property consisted of various securities which had been bought

on account of the two Misses Sims by Mr. Lamar, in New York, in 1862, with the proceeds of certain stock of the Bank of the Republic, of New York, which stock had been held for the two Miss Sims.

The value of these securities on the 24th day of May, 1867, the date on which they were turned over, has been found by the court to have been $6,631.61. In the decrees that have been entered in these two suits this sum has been credited as so much paid by Mr. Lamar to Ann C. Sims on account of money he had received as her guardian, whereas the papers clearly show that it was intended by him, and received by her new guardian as a payment to her new guardian of what he, Mr. Lamar, had received as her guardian, and also of what he had received as guardian of her dead sister, Martha M. Sims, and which was due to her, Ann C. Sims, as her next of kin. Nowhere in the proceedings before the court or before the master was any exception taken in behalf of your petitioner, to this manner of crediting the value of the property so turned over, because so long as credit was given for the value
261 of the property paid over, it did not occur to your petitioner or to his counsel that it made any difference in the progress of the litigation or in the amount that might be decided finally to be due, and until the final determination by the court it was of course unknown what the amount due in each suit would be. Judgment was entered in the two suits on the 21st of May, 1881—in the suit in which the estate of Ann C. Sims is plaintiff for $4,697.13, and in the suit in which the estate of Martha M. Sims is plaintiff is the sum of $18,957.82. These two suits have in effect by both parties been always considered as one and the same suit, having been tried together and heard on the same testimony.

Mr. Lamar, as already stated, received the same sum for each of these wards in 1855, and the reason why there is any considerable difference in the amounts to be recovered by the two estates now is simply because Mr. Lamar has in the accounting before the master received, from the estate of Martha M. Sims credit for all that he turned over to her guardian as so much paid to her on account of his guardianship
262 of her property, whereas it was understood and intended by Mr. Lamar and by the new guardian as a settlement both of Mr. Lamar's account as guardian of the property of Martha M. Sims and of Ann C. Sims.

Your petitioner, under the advice of his counsel, purposes and has purposed, ever since the interlocutory decree herein, to appeal these suits to the Supreme Court of the United States, and now when his counsel are taking steps to do so, a question has arisen. whether the suit in which the estate of Ann C. Sims is plaintiff can be appealed by reason of the fact that the actual money judgment is for less than $5,000.

In the opinion of your petitioner's counsel there is reason to hold that that the suit in which the estate of Ann C. Sims is plaintiff, is so connected with the suit in which the estate of Martha M. Sims is plaintiff, both in its facts and in its judgment, and by reason of the cross bills, that the matter in dispute therein is more than the amount of the judgment, and that an appeal ought to be allowed therein, even though the amount of the judgment is less than $5,000.

But this question is not free from difficulty, and however de-
263 cided by the court below would probably necessitate ultimate decision thereon by the Supreme Court of the United States, and your petitioner has therefore been advised by his counsel, with the purpose of avoiding delays incident to the decision as to the appealability of such suit, and in the furtherance of justice, that he should

petition to the court upon the record in the two cases for a rehearing thereof and an amendment to the final decrees therein, in such a way that the said sum of $6,631.61 should be credited as having been paid by Mr. Lamar, in equal parts, to the estates of Martha M. Sims, and Ann C. Sims, instead of to the estate of Ann C. Sims alone; which correction of the judgment would in no way diminish the total amount of the two judgments, and under the provisions of the will of Ann C. Sims, Mary J. C. Micou, the aunt of the Misses Sims, and the plaintiff in a representative capacity in both suits, is entitled to whatever may be recovered in both suits, so that the plaintiff would be prejudiced in no way, being in interest the same in each suit.

Such amendment would be carrying out the undoubted intention of all parties at the time the securities were turned over by Mr. La-
264 mar, and would enable the judgment to be so modified that in the two suits the amount of the judgment would be nearly equal, viz, more than eight thousand dollars in each suit.

In case of appeal the defendant purposes to deposit with the court abundant security, so that in no way would the rights of the plaintiff be injured or liable to injury, whereas, if the amendment is not made it might happen that the injury done to the defendant would be serious and irreparable.

Wherefore your petitioner prays that the two suits may be reheard, and the decrees therein amended as herein above stated.

New York, July 28th, 1881.

G. DE ROSSET LAMAR,
Executor under the will of Gazaway B. Lamar, dec'd.

We hereby waive verification of this petition.

NASH & HOLT,
Pl'ff's Att'y's.

265 (Endorsed) U. S. circuit court, southern district of New York. Mary J. C. Micou, administratrix, &c., of Ann C. Sims, vs. G. De Rosset Lamar, executor, &c. Mary T. C. Micou, administratrix, &c., of Martha M. Sims, vs. The Same. Petition for rehearing and to amend decrees. Dickerson & Beaman, sol's for def't. U. S. circuit court. Filed Jul. 29, 1881. Joseph M. Deuel, clerk.

266 United States circuit court, southern district of New York.

MARY J. C. MICOU, ADM'X, &C., OF ANN C., Sims, deceased,
vs.
G. DE ROSSET LAMAR, EXEC'R, &C.

THE SAME ADM'X, &C., OF MARTHA M. SIMS, deceased,
vs.
THE SAME.

SOUTHERN DISTRICT OF NEW YORK.
City and County of New York, ss:

George C. Holt being duly sworn deposes and says:

I am one of the firm of Nash & Holt the plaintiff's attorneys in the above suits. The said suits were brought for an accounting of the guardianship of Gazaway B. Lamar, the defendant's testator, who

was in his life-time guardian of the persons and estates of Ann C. Sims and Martha M. Sims, the plaintiff's intestates. There have been great delays in these suits. They were begun in the New York supreme court in August 1875, and were removed by the defendant into this
267 court in October 1875. They were brought on for a hearing upon the pleadings and proofs before Mr. Justice Choate in December, 1879. This was the first occasion on which the cases were reached on the calendar. Judge Choate rendered a decision in favor of the plaintiffs upon the main questions involved and ordered a reference to a master to state an account in each case. Testimony was taken upon such accounting, and the accounts stated by the master, and as stated filed with his reports in December, 1880, almost an entire year having been occupied in such accounting, principally by the defendant's delays in getting testimony and in preparing facts for a stipulation. Numerous exceptions to such master's reports and accounts were filed by defendant and one or two exceptions by plaintiff. Such exceptions were brought on and argued before Judge Choate just before his illness last spring and after his recovery a decision was rendered allowing certain of said exceptions and disallowing others. Thereupon the plaintiff's attorneys restated said accounts and submitted them, with the proposed decrees to be entered thereon, to defendant's attorneys, who,
268 after full examination of them approved them as to form, as appears by the indorsement of such approval on said decrees as entered, and thereupon the final decrees were presented to Judge Choate and signed by him and entered May 21, 1881.

At an interview between Mr. Beaman and myself which took place within a short time—I am quite confident within three or four days—after said decrees were entered, I asserted that I did not think the smaller judgment appealable, and after some discussion Mr. Beaman suggested that we go together before Judge Blatchford and be heard on the question whether he should issue a citation on appeal in the smaller case, and I agreed to do so at any time. Thereafter from time to time I urged Mr. Beaman to have such a hearing, but it was not till very near the end of June that it took place. We then went before Judge Blatchford, and were heard briefly. Mr. Beaman had no papers prepared and asked leave to submit them later, and it was arranged that he should send me his brief when it was ready. About July 13th, having heard nothing from Mr. Beaman meanwhile, I called on
269 him and urged that he proceed in the cases, and he then stated for the first time that he had decided to apply to amend the decrees and restate the accounts, and the papers for such motion were served on my firm July 19th, about a week later.

The making up these accounts has been in each instance a matter of a good deal of labor. A change in them involves an entire recasting of them, because they carry interest with annual rests. If they be again reopened the result will probably be, judging from the past history of this case, a further delay of at least several months. The plaintiff's attorneys have pushed these cases as fast as possible from the beginning, and have permitted no delay which they could prevent. I do not assert that the defendant's attorneys have wilfully caused delay, but their course in these cases has produced that result to an extraordinary extent. Our client resides in Alabama and keeps up a constant correspondence with us, and it is very difficult to make any satisfactory explanation by letter of the constantly recurring delays in these cases. I am constantly apprehensive that my firm will be blamed for permitting them.

270 I refer for additional facts to the statement of facts stipulated and used on the trial and to the pleadings, accounts, and decrees in the suits as a part of this affidavit.

The statement in Mr, Beaman's affidavit, that these two suits have in effect, by both parties, been always considered as one, is somewhat ambiguous. It is true that they were tried together, upon the same proofs, and are in substance similar suits; but they have always been kept distinct, having separate pleadings and papers in each case, and could not have been consolidated or joined in one action, in my opinion, without violating fundamental principles of law.

GEO. C. HOLT.

Sworn to before me this 21st day of July, 1881.

L. MORTIMER THORN, JR.,
Notary Public (95), *N. Y. Co.*

(Endorsed:) U. S. circuit court, S. D. of New York. Mary J. C. Micou, adm'x, &c., of Ann C. Simms, deceased, vs. G. De R. Lamar, exec'r, &c. The same adm'x, &c., of Martha M. Sims, deceased, vs. Same. Affidavit of G. C. Holt. Nash & Holt, compl't's, sol'rs, 51 William st., N. Y. U. S. circuit court. Filed July 29, 1881. Joseph M. Deuel, clerk.

271 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the day of July, in the year of our Lord one thousand eight hundred and eighty-one.

Present, the Hon. Samuel Blatchford, circuit judge.

MARY J. C. MICOU, ADMINISTRATRIX, &C., OF Ann C. Sims, dec'd,
vs.
G. DE ROSSET LAMAR, EX'R, &C.

THE SAME, ADM'X, &C., OF MARTHA M. SIMS, dec'd,
vs.
THE SAME.

Upon an affidavit of Charles C. Beaman, jr., verified July 11, 1881, and the proceedings already taken herein, and an order thereon
272 of this court, dated July 13, 1881, staying the execution in both of the above suits, and giving notice of a motion to amend the final decree entered in the above suits, on May 21, 1881, and upon the affidavit of George C. Holt, verified July 21, 1881, and the documents therein referred to, filed in opposition to said motion, and upon the petition herein of the defendant, dated July 28th, 1881, and filed by leave of the court upon the argument; after hearing Charles C. Beaman, jr., of counsel for defendant, in support of said motion and petition, and George C. Holt, of counsel for complainant, in opposition thereto, and upon a rehearing in accordance with said motion, and with the prayer of said petition, and argument thereon by the respective counsel—

It is ordered and decreed that the said motion and the amendment to the respective decrees in the above suits asked for in said petition

is hereby denied, and the stay of execution directed by said order is hereby vacated and set aside.

SAM'L BLATCHFORD.

Approved as to form.

NASH & HOLT,
Pl'ff's Att'ys.

273 (Endorsed:) U. S. circuit court, southern district of N. Y. Mary J. C. Micou, administratrix, &c., of Ann C. Sims, vs. G. De Rosset Lamar, ex., &c. Mary J. C. Micou, administratrix, &c., of Martha M. Sims, vs. The Same. Order and decree denying motion, and also denying amendment to decrees, after rehearing in accordance with the prayer of petition. U. S. circuit court. Filed July 29, 1881. Joseph M. Deuel, clerk.

274 U. S. circuit court, southern district of New York. In equity.

MARY J. C. MICOU, AS ADMINISTRATRIX WITH the will annexed of the goods, chattels, and credits which were of Ann C. Sims, deceased, complainant,
vs.
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased, defendant.
} Original suit.

G. DE ROSSET LAMAR, AS EXECUTOR OF THE will and testament of Gazaway B. Lamar, deceased, complainant,
vs.
MARY J. C. MICOU, AS ADMINISTRATRIX WITH the will annexed of Ann C. Sims, deceased, defendant.
} Cross-bill.

To the honorable the Supreme Court of the United States:

275 The appeal of G. De Rosset Lamar, the defendant in the first of the above suits and the plaintiff in the second of the above suits and the appellant in both of the same, respectfully showeth: That upon the 1st day of July, 1875, the first of the above suits, hereinafter described as the original suit, was brought in the New York supreme court against the above-named defendant and appellant by Ann C. Sims, alleging that the aforesaid Gazaway B. Lamar had been, on or about the 21st day of December, 1855, duly appointed the general guardian of the person and estate of the aforesaid Ann C. Sims, by the surrogate of the county of Richmond, in the State of New York, and that the said Gazaway B. Lamar, as such guardian, had accepted and taken into his own possession, custody, and control all the property of said Ann C. Sims, being not more than five thousand dollars in cash and other property, but that neither he nor the said defendant, G. De Rosset Lamar, had rendered a just and true account of his guardianship, and praying that the defendant as executor of the said Gazaway B. Lamar render a just and true account of all moneys and property of the said Ann C. Sims received by the said Gazaway B. Lamar during his life-time as guardian of the estate of Ann C. Sims and of the application thereof, and of his guardianship in all respects, and that the de-

fendant account to the plaintiff for all the property, assets, and effects of the plaintiff which passed into the defendant's possession as
276 such executor upon the death of said Gazaway B. Lamar and that the plaintiff have judgment against the defendant as executor as aforesaid for the balance found to be due upon said accounting.

And afterwards, and before the filing of the answer therein, the defendant having appeared, by Messrs. Dickerson & Beaman, his attorneys, by due and proper proceedings removed the said suit from the New York supreme court to the circuit court of the United States for the southern district of New York, and thereafter duly answered in said suit alleging that the relation of guardian and ward set forth in the bill of complaint had ceased and determined so far as the same depended upon orders or decrees of the surrogate's court of Richmond County, and that he was no longer liable as guardian of the said Ann C. Sims, and that he had accounted for and paid over to one Benjamin H. Micou, guardian, all the estate of which he, the said Lamar, was chargeable as guardian of said Ann C. Sims and received from the said Micou, as guardian, a full release therefor and that the said Ann C. Sims ratified and confirmed the same when she became of age, and the defendant therefore prayed that the aforesaid complaint be dismissed with costs and disbursements.

And afterwards, on the 4th day of January, 1876, the complainant filed her replication to said answer in the clerk's office of the circuit court of the United States for the southern district of
277 New York, and thereafter and on or about the 7th day of May, 1878, the said Ann C. Sims died having made and published her last will and testament in writing, and thereafter the aforesaid suit was revived by a bill of revivor, brought in the name of Mary J. C. Micou, as administratrix with the will annexed of all the goods, chattels, and credits which were of the said Ann C. Sims, deceased, and the said original suit thereafter proceeded in the name of Mary J. C. Micou, administratrix as aforesaid, as complainant.

And thereafter, and on or about the third day of October, 1878, the defendant in said suit, G. De Rosset Lamar, executor as aforesaid, brought in the said circuit court of the United States for the southern district of New York, a bill in equity, or cross-bill, against the said Mary J. C. Micou, the plaintiff in the original suit, administratrix as aforesaid, alleging among other things, that by reason of the will of said Ann C. Sims, sister of said Martha M. Sims, the said Mary J. C. Micou was entitled to receive for her own benefit, and as her own property, whatever might be recovered in the aforesaid original suit against the said Lamar, defendant, and that the said Mary J. C. Micou had approved and ratified certain acts of the said Gazaway B. Lamar with reference to his guardianship as aforesaid of the
278 said Ann C. Sims, and was thereby estopped from averring that such acts were not in every respect right, proper, and legal in the premises, and was thereby not entitled to recover in said suit, and in said cross-bill it was prayed by the said Lamar that the aforesaid bill of the said Mary J. C. Micou, as administratrix of Ann C. Sims, be dismissed, with costs. And thereafter the said Mary J. C. Micou filed her answer in the said cross-suit, denying that the complainant therein was entitled to the relief prayed for, and praying that the said cross-bill be dismissed, with costs.

And thereafter the said original suit of Micou against Lamar and the said cross-suit of Lamar against Micou having come on to be heard together before the honorable William G. Choate, judge, on the 1st of De-

cember, 1879, upon the proofs and arguments of counsel, and his decision having been rendered thereon, an interlocutory decree was filed in said original suit of Micou against Lamar, ordering that it be referred to James H. Gilbert, one of the commissioners of the court, as master, to take an account of the estate of Ann C. Sims, which came to the hands of Gazaway B. Lamar as her guardian, as in the bill of complaint stated, or which, without his default, might have so come to his
279 hands; and further orders or directions were in said interlocutory decree given to the said master with reference to his duties therein and on the same day a decree was entered dismissing the bill of complaint in said cross-suit of Lamar against Micou, with costs to be taxed.

And thereafter, upon proceedings duly had before him in behalf of the respective parties to said original suit, the master made his report to the court, and thereafter said suit having come on to be heard upon the said report and also upon the exceptions thereto of the respective parties and upon agreement of counsel, the said report of the master was, in some respects, confirmed, and in other respects modified; and on the 21st day of May, 1881, a final decree was made and pronounced, in which it was in substance adjudged and decreed that the amount for which the defendant, as the executor of the will of Gazaway B. Lamar, was accountable therein to the complainant, was four thousand four hundred and sixteen dollars and forty-six cents, and it was therein ordered that the complainant recover of the said defendant the said sum, together with two hundred and sixty dollars and twenty-seven cents, as his costs, or the total sum of four thousand six hundred and
280 ninety-seven dollars and thirteen cents, to be levied and collected of the goods, chattels, and credits of Gazaway B. Lamar in the hands of said G. De Rosset Lamar, executor.

And thereafter, upon an order to show cause why there should not be a modification of the final judgment entered in such original suit, and also of the final judgment entered in another original suit in the same court, in which the same person was defendant, and in which the said Mary J. C. Micou, as administratrix of the goods, chattels, and credits remaining unadministered, which were of Martha M. Sims, was plaintiff, which two suits had been tried together upon the same testimony, and in which two suits decrees had been entered upon the same day; and also upon a petition of the said defendant asking that a rehearing be allowed in the said two suits, and that a certain credit claimed to have been in part wrongfully allowed to the defendant in the one suit should be transferred and allowed to the same defendant in the other suit, and that the judgments in the two suits should be amended accordingly, which amendments, if they had been allowed, would have in no way changed the total amount of the judgments in the two suits, but would have made the judgment in each suit
281 for a sum larger than eight thousand dollars. And upon said order to show cause, and upon said petition, each of which were entitled in said two suits, a rehearing in said two suits was allowed and made before the honorable Samuel Blatchford, judge, and after such rehearing, an order or decree was made, entitled in said two suits, denying the said motion & petition.

Wherefore, this appellant appeals from the whole of said decree of said circuit court of the United States in said original suit, and respectfully prays that the decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause

anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said suit with costs, or such other decree as to the said Supreme Court shall seem just.

And this appellant further appeals from the whole of said decree of said circuit court of the United States in said cross-suit, and respectfully prays that the decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence, and all proceedings in the said cause may be sent to the Supreme Court of the United States
282 without delay, and that the said Supreme Court will proceed to hear the said cause anew, and the said decree of the circuit court and every part thereof be reversed, and a decree made in accordance with the prayer of the bill of complaint in said cross-suit, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated New York, August 16th, 1881.

DICKERSON & BEAMAN,
Solicitors for Appellant.
CHARLES C. BEAMAN, JR.,
Of Counsel.

We hereby, in behalf of the plaintiff in the above-recited original suit, and of the defendant in the above-recited cross-suit, consent that the appeal taken or to be taken under the foregoing petition shall be considered to have the same and like effect as if it were taken in the two suits separately and without prejudice to the objection that the actions are not appealable at all.

New York, August 13th, 1881.

NASH & HOLT,
Att'ys for Appellee.

The foregoing appeals are allowed.
August 22d, 1881.

SAM'L BLATCHFORD,
Circuit Judge.

283 (Endorsed:) U. S. circuit court, southern district of New York. Mary J. C. Micou, as administratrix, with the will annexed, of the goods, chattels, and credits which were of Ann C. Sims, deceased, complainant, vs. G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, defendant (original suit). G. De Rosset Lamar, as executor, &c., vs. Mary J. C. Micou, as administratrix, &c. (cross-bill). Petition of appeal to United States Supreme Court. Dickerson & Beaman, solicitors for respondents.

Service of a copy of within this day admitted.
August 27, 1881.

NASH & HOLT,
Solicitors for Appellee.

U. S. circuit court. Filed Aug. 31, 1881. Joseph M. Deuel, clerk.

284 United States circuit court, southern district of New York.

MARY J. C. MICOU, AS ADMINISTRATRIX, WITH the will annexed, of the goods, chattels, and credits which were of Ann C. Sims, deceased,
against
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased.

A decree having heretofore, and on the 21st day of May, 1881, been entered in the above-entitled suit, dated on said day, and adjudging and decreeing that Mary J. C. Micou, as administratrix, with the will annexed, of the goods, chattels, and credits which were of Ann C. Sims, deceased, the complainant above named, recover of G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, the above-named defendant, the sum of four thousand six hundred and ninety-seven dollars and thirteen cents, to be levied and collected of the goods, chattels, and credits of Gazaway B. Lamar in the hands of said G. De Rosset Lamar, as such executor, to be administered; and the said defendant being about to file his petition of
285 appeal from said decree to the Supreme Court of the United States, dated August 16th, 1881, and to present a citation thereon for signature by Hon. Samuel Blatchford, circuit judge: Now, it is hereby consented, stipulated, and agreed by and between the solicitors for the respective parties to this suit that if the said petition of appeal is allowed, and the said citation signed, the said G. De Rosset Lamar, as executor, &c., as aforesaid, may deposit to the credit of said suit in the New York Life Insurance and Trust Company of the city of New York the four per cent. bonds of the United States to the face or par value of five thousand five hundred dollars, as security that said defendant will prosecute his said appeal to effect and will pay all costs and damages which may be awarded against him on said appeal; and that such bonds shall remain on deposit with said trust company under this stipulation, and the order to be entered thereon, subject to the further order of this court herein, and that said trust company shall collect and receive and retain in like manner to the credit of this suit all interest and dividends to accrue thereon.

And it is further stipulated and agreed that such deposit (to
286 be evidenced by the service on complainant's solicitors and the filing in the office of the clerk of this court of a certificate of the said trust company that such deposit has been made and that such bonds are held by it subject to the order of this court in this suit) shall stay the issuing of any process to enforce the levy and collection of the amount awarded to the complainant by the decree aforesaid, in the same manner and with the like effect as if a supersedeas bond in the usual manner and form as required by law to stay the issuing of such process were duly executed by said defendant and accepted and approved by the judge of this court.

And it is further stipulated and agreed that in case of the affirmance of the said decree so appealed from, either in whole or in part, or of the dismissal of said appeal if the said defendant shall not, within ten days after written notice to his solicitors of the entry of judgment of such affirmance or dismissal, pay all costs and damages which may have been awarded against him on said appeal, and the amount awarded to the

complainant by said decree, or the part thereof as to which said decree shall have been affirmed if affirmed only in part, then the said complainant may obtain from this court, on five days' notice to the defend-
287 ant or his solicitors, an order directing the said trust company to sell such bonds so to be deposited with it as aforesaid in such manner as this court may by its order direct, and out of the proceeds of such sale and any dividends or interest collected as aforesaid, after deducting therefrom its lawful charges and commissions touching the same, to pay to the complainant all such costs and damages which may have been awarded against said defendant on said appeal, and the amount awarded to her by said decree, or the part thereof as to which said decree shall have been affirmed if affirmed only in part, and the overplus, if any, to the defendant.

And it is further stipulated and agreed that, upon the payment of such costs and damages as aforesaid, and of such amount so awarded to said complainant by said decree, or of the part thereof as to which said decree shall have been affirmed, if affirmed only in part, or in case the said decree shall be reversed, vacated, or annulled, the said defendant may obtain from this court, on five days' notice to the complainant or her solicitors, an order directing the said trust company, to turn over to him such bonds so to be deposited as aforesaid, together
288 with all accumulations thereof, and interest collected and received thereon, less said trust company's lawful charges and commissions touching the same.

And it is further stipulated that, in case said decree be reversed and a new accounting ordered, upon the ground of an error or errors in taking the account, which when corrected will still leave a recovery in favor of the complainant, or upon any ground which will have the effect not of deciding the cause finally in favor of the defendant, but only of varying the amount to be recovered by the complainant, then and in that event the security so deposited shall not all be delivered to the defendant, but the same or such part thereof as may be necessary to secure any probable ultimate recovery shall be retained in said trust company, subject to the final determination of this cause and to the order of this court in reference thereto.

The execution of this stipulation by the complainant's solicitors shall not be deemed a waiver by the complainant of the objection that the decree in this suit is not appealable to the Supreme Court of the United States, for the reason that the amount of the recovery therein is
289 less than five thousand dollars, and is without prejudice to any motion to dismiss the appeal, or to any other proceedings which have been or may be taken in the suit based upon such objection.

Dated August 16, 1881.

NASH & HOLT,
Solicitors for Complainant.
DICKERSON & BEAMAN,
Solicitors for Defendant.

(Endorsed:) United States circuit court, southern district of New York. Mary J. C. Micou, as administratrix, with the will annexed, &c., of Ann C. Sims, deceased, against G. De Rosset Lamar, as ex't'r, &c., of Gazaway B. Lamar, deceased. Stipulation as to security on appeal. Dickerson & Beaman, def't's attorneys, Staats Zeitung building, Lyon row, New York City. U. S. circuit court. Filed Aug. 22, 1881. Joseph M. Deuel, clerk.

290 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 22d day of August, in the year of our Lord one thousand eight hundred and eighty-one.

Present, Hon. Samuel Blatchford, justice.

MARY J. C. MICOU, AS ADMINISTRATRIX WITH the will annexed of the goods, chattels, and credits, which were of Ann C. Sims, deceased,
against
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will and testament of Gazaway B. Lamar, deceased.

On reading and filing the stipulations in the above-entitled suit, by the attorneys for the respective parties, dated August 16th, 1881, and upon signing of the petition of appeal and of the citation herein, and, upon motion of Dickerson & Beaman, attorneys for the defendant—

291 It is ordered and decreed that the defendant G. De Rossit Lamar, as executor, &c., as aforesaid, may deposit to the credit of said suit in the New York Life Insurance and Trust Company of the city of New York, the four per cent. bonds of the United States to the face or par value of five thousand five hundred dollars, as security that said defendant will prosecute his said appeal to effect, and will pay all costs and damages which may be awarded against him on said appeal, and that such bonds shall remain on deposit with said trust company under this order, subject to the further order of this court herein, and that said trust company shall collect and receive and retain in like manner to the credit of this suit all interest and dividends to accrue thereon.

And it is further ordered that such deposit (to be evidenced by the service on complainant's solicitors, and the filing in the office of the clerk of this court of a certificate of the said trust company that such deposit has been made and that such bonds are held by it subject to the order of this court in this suit) shall stay the issuing of any process to enforce the levy and collection of the amount awarded to the

292 complainant by the decree aforesaid, in the same manner and with the like effect as if a supersedeas bond in the usual manner and form as required by law to stay the issuing of such process were duly executed by said defendant and accepted and approved by the judge of this court.

And it is further ordered that in case of the affirmance of the said decree so appealed from either in whole or in part or of the dismissal of said appeal, if the said defendant shall not, within ten days after written notice to his solicitors of the entry of judgment of such affirmance or dismissal, pay all costs and damages which may have been awarded against him on said appeal, and the amount awarded to the complainant by said decree or the part thereof as to which said decree shall have been affirmed if affirmed only in part, then the said complainant may obtain from this court, on five days' notice to the defendant or his solicitors, an order directing the said trust company to sell such bonds so to be deposited with it as aforesaid in such manner as this court may by its order direct, and out of the proceeds of such sale and any dividends or interest collected as aforesaid, after deducting therefrom its lawful charges and commissions touching the same,

293 to pay to the complainant all such costs and damages which may

have been awarded against said defendant on said appeal, and the amount awarded to her by said decree or the part thereof as to which said decree shall have been affirmed, if affirmed only in part, and the overplus, if any, to the defendant.

And it is further ordered that upon the payment of such costs and damages as aforesaid, and of such amount so awarded to said complainant by said decree, or of the part thereof as to which said decree shall have been affirmed, if affirmed only in part, or in case the said decree shall be reversed, vacated, or annulled, the said defendant may obtain from this court, on five days' notice to the complainant or her solicitors, an order directing the said trust company to turn over to him such bonds so to be deposited as aforesaid, together will all accumulations thereof and interest collected and received thereon, less said trust company's lawful charges and commissions touching the same.

And it is further ordered that in case said decree be reversed and a new accounting ordered upon the ground of an error or errors in taking the account, which, when corrected, will still leave a recov-
294 ery in favor of the complainant, or upon any ground which will have the effect not of deciding the cause finally in favor of the defendant, but only of varying the amount to be recovered by the complainant, then and in that event the security so deposited shall not all be delivered to the defendant, but the same or such part thereof as may be necessary to secure any probable ultimate recovery shall be retained in said trust company subject to the final determination of this cause and to the further order of this court in reference thereto.

And it is further ordered that this order be without prejudice to any motion to dismiss the appeal or to any other proceedings which have been or may be taken in this suit by the complainant upon the ground that the decree in this suit is not appealable to the Supreme Court of the United States, for the reason that the amount of the recovery therein is less than five thousand dollars.

SAM'L BLATCHFORD.

295 (Endorsed:) United States circuit court, southern district of New York. Mary J. C. Micou, as administratrix with the will annexed, &c., of Ann C. Sims, deceased, against G. De Rossett Lamar, as executor, &c., of Gazaway B. Lamar, deceased. Order as to security on appeal. Dickerson & Beaman, def't's attorneys. Staats Zeitung b'l'g, Tryon row, New York City. U. S. circuit court. Filed Aug. 22, 1881. Joseph M. Deuel, clerk.

296 N. Y. LIFE INSURANCE AND TRUST CO.,
New York, August 27, 1881.

United States circuit court for the southern district of New York.

MARY J. C. MICOU, AS ADM'X WITH THE WILL annexed, &c., of Ann C. Sims, deceased,
against
G. DE ROSSET LAMAR, AS EXECUTOR OF THE last will & testament of Gazaway B. Lamar, deceased.

Received from Charles C. Beaman, jr., att'y for G. De Rosset Lamar, as ex't'r of the last will and testament of Gazaway B. Lamar, dec'd, fifty-five hundred dollars of United States four per cent. consols of 1907, coupon bonds, with all the coupons attached, including those due Oc-

tober 1st, 1881, and numbered as follows, viz: 201833, 201837, 252.99–300, and 949, for one thousand dollars each, and No. 57703 for five hundred dollars; said bonds being deposited under an order of the U. S. circuit court for the southern district of New York, bearing date August 22, 1881, and are to be held by the New York Life Insurance and Trust Company subject to the further order of said court. The interest coupons, as collected from time to time, to be placed to the credit of the above-entitled action, subject in like manner to the order of said court, with interest at the rate of three per cent. per annum.

The commission of this company is to be one per cent. upon the par value of said bonds.

CHARLES G. THOMPSON,
Pres't pro tem.

297 (Endorsed:) U. S. district court for the so. dist. of N. Y. Mary J. C. Micou, as adm'x with the will annexed, &c., of Ann C. Sims, dec'd, vs. G. De Rosset Lamar, as executor, &c., of Gazaway B. Lamar, dec'd. Receipt of the N. Y. Life Ins. & Trust Co. for $5,500 of U. S. bonds deposited with them under order of Aug. 22, 1881, in the above-entitled cause. Dickerson and Beaman, def't's att'ys.

Service of a duplicate of the within receipt or certificate of the New York Life Insurance and Trust Company is admitted, such certificate being given in accordance with the order in the above suit dated August 22, 1881.

NASH & HOLT,
Solicitors for Appellee.

NEW YORK, *August* 30, 1881.

U. S. circuit court. Filed August 31, 1881. Joseph M. Deuel, clerk.

298 By the honorable Samuel Blatchford, one of the justices of the circuit court of the United States for the southern district of New York.

To Mary J. C. Micou, as administratrix with the will annexed of the goods, chattels, and credits which were of Ann C. Sims, deceased.

Whereas G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, has lately appealed to the Supreme Court of the United States from decrees lately rendered in the circuit court of the United States for the southern district of New York in your favor in an original suit in which you are plaintiff, and also in a cross-suit in which you are defendant; and whereas the said G. De Rosset Lamar has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court in each of said suits at the city of Washington on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the twenty-second day
299 of August, in the year of our Lord one thousand eight hundred and eighty-one.

SAM'L BLATCHFORD.

(Endorsed:) United States circuit court, southern district of New York. Mary J. C. Micou, as administratrix with the will annexed, &c.,

of Ann C. Sims, deceased, against G. De Rosset Lamar, as executor, &c., of Gazaway B. Lamar, deceased. Citation on appeal. Dickerson & Beaman, def't's attorneys, Staats Zeitung b'ld'g, Tryon row, New York City.

Service of copy within this day admitted.

August 27, 1881.

NASH & HOLT,
Solicitors for Appellee.

U. S. circuit court. Filed Aug. 31, 1881. Joseph M. Deuel, clerk.

300 UNITED STATES OF AMERICA,
Southern District of New York:

I, Joseph M. Deuel, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the following pages, numbered from one to two hundred and ninety-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Mary J. C. Micou, as administratrix, with the will annexed of the goods, chattels, and credits, which were of Ann C. Sims, deceased, complainant & appellee, vs. G. De Rosset Lamar, as executor of the last will and testament of Gazaway B. Lamar, deceased, defendant & appellant.

Original suit. G. De Rosset Lamar, as executor of the will of Gaz-
301 away B. Lamar, deceased, complainant & appellant, vs. Mary J. C. Micou, as administratrix with the will annexed of Ann C. Sims, deceased, defendant & appellee, cross-bill, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighth day of October, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the said United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

(Indorsement on cover:) No. 998. G. De Rosset Lamar, executor of Gazaway B. Lamar, deceased, appellant, vs. Mary J. C. Micou, administratrix of Ann C. Sims, deceased. S. New York. C. C. U. S. Filed October 10, 1881.

OFFICE SUPREME COURT U. S.
FILED
OCT 26 .881
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No.

MARY J. C. MICOU, AS ADMINISTRATRIX, &c., OF ANN C. SIMS, DECEASED,
Complainant and Appellee,

vs.

G. DE ROSSET LAMAR, AS EXECUTOR, &c., OF GAZAWAY B. LAMAR, DECEASED,
Defendant and Appellant.

Original Suit.

G. DE ROSSET LAMAR, AS EXECUTOR, &c., OF GAZAWAY B. LAMAR, DECEASED,
Complainant and Appellant,

vs.

MARY J. C. MICOU, AS ADMINISTRATRIX, &c., OF ANN C. SIMS, DECEASED,
Defendant and Appellee.

Cross-Suit.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, SECOND CIRCUIT.

FILED

BRIEF FOR APPELLEE IN SUPPORT OF MOTION TO DISMISS APPEAL.

Supreme Court of the United States. 1

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED,
Complainant and Appellee,

vs.

Original Suit.

G. DEROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED, 2
Defendant and Appellant.

Docket No.

G. DEROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED,
Complainant and Appellant,

vs.

Cross-Suit.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED, 3
Defendant and Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York, Second Circuit.

Take notice that upon the record in this action returned on appeal, a motion in behalf of the appellee will be sub-

mitted, upon the printed brief or argument annexed, to the Supreme Court of the United States, at the court room of said court at the Capitol in Washington, on Monday, the 21st day of November, 1881, at the opening of the court, or as soon thereafter as the motion can be entertained, that the appeal in this cause be dismissed, on the ground that the Supreme Court is without jurisdiction to entertain and determine said appeal, for the reason that the amount involved is less than five thousand dollars.

Dated New York, October 24, 1881.

S. P. NASH,
Counsel for Appellee.

To E. N. DICKERSON and
CHARLES C. BEAMAN, Jr.,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES. 6

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED,
Complainant and Appellee,

vs.

G. DEROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED,
Defendant and Appellant.

Original Suit.

7

G. DEROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED,
Complainant and Appellant,

vs.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED,
Defendant and Appellee.

Cross-Suit.

8

Brief for Appellee on Motion to Dismiss Appeal.

This is a motion to dismiss an appeal for want of jurisdiction, on the ground that the amount involved is less than five thousand dollars.

The original suit was a suit in equity for an accounting brought by Ann C. Sims against the executor of Gazaway B. Lamar, who was in his lifetime her guardian. The suit was begun in July, 1875, in the New York Supreme Court,

9 and was removed by the defendant into the United States Circuit Court. The substantial question involved in the suit was whether the guardian was chargeable with certain investments of his ward's estate in securities of the Confederate States, and of certain cities and corporations within the Confederate States, made during the war. The evidence consisted principally of a statement of facts agreed upon by counsel. In May, 1878, after the cause was ready for hearing, Ann C. Sims, the complainant, died. Mary J. C. Micou, the present complainant, was appointed administratrix, and the suit revived and continued in her name as such administratrix. After such revivor, the defendant in the original suit filed a cross-bill against the complainant, alleging in substance the pendency of the original suit, that Mary J. C. Micou, the
10 administratrix, had known and approved the acts of Lamar as guardian when they took place, and was therefore estopped from objecting to them. Issue was joined in the cross-suit, and the original suit and cross-suit brought to a hearing together.

The court rendered a decision in favor of the complainant, and in January, 1880, an interlocutory decree was entered in the original suit, directing that an account be taken therein by a Master, and a decree was entered in the cross-suit, dismissing the complaint in that suit on the merits. Testimony was taken before the Master, who stated an account between the guardian and ward, and made a report showing a balance due from the estate of the guardian to the estate of the ward on January 1, 1881, of $4,875.49.
11 Exceptions were filed to this report by both parties. Some of the exceptions were sustained by the court, the account modified accordingly, and on May 21, 1881, a final decree was entered whereby it was decreed that the complainant recover of the defendant $4,416.46, with $260.77 costs, amounting in all to $4,677.13. From this decree, and from the decree dismissing the complaint in the cross suit, this appeal is taken.

At the same time that Gazaway B. Lamar was appointed guardian of Ann C. Sims, he was also appointed guardian of her sister, Martha M. Sims, and as such took possession of her property. This appointment was in 1855. Martha

was then six years old, and Ann four. In 1864, Martha, 12
being then fifteen years old, died unmarried, intestate, and leaving her sister Ann her sole next of kin. In June, 1875, Ann C. Sims was appointed administratrix of Martha's estate by the Surrogate of New York, and, as such, brought a suit against Mr. Lamar's executor to compel an accounting of his guardianship of her sister's estate, at the same time that the suit in her individual behalf was begun. The two suits were identical in their nature, and have been carried on and tried together, much of the testimony being applicable, and the same proceedings substantially being necessary in each case; but the two suits are, and always have been, entirely distinct and separate suits. Upon the death of Ann C. Sims, Mary J. C. Micou was also appointed administratrix, *de bonis non*, of Martha M. Sims, and the 13
Martha Sims suit was revived and continued in her name as such administratrix. The result in the Martha Sims suit was a final decree in favor of the complainant for $18,957.82.

Some weeks after the final decrees in the two suits were entered, the defendant made a motion to vacate the final decrees and restate the accounts in both suits, so that certain amounts which were charged in the Ann Sims account exclusively should be divided, and half of such amounts charged in each of the two accounts. The motion, if granted, would not have varied the total amount of the recovery against the defendant in the two suits, but would have had the effect to increase the judgment in the Ann Sims suit by an amount equal to that by which the judg- 14
ment in the Martha Sims suit would be diminished. The result would be that both judgments would be for more than $5,000, and consequently appealable to this court, and that was obviously the real object of the motion.

The facts necessary to be considered to understand this motion are these: In 1856, immediately after Mr. Lamar's appointment as guardian, he invested money of his wards in stock of the Bank of the Republic, of New York, purchasing in all 25 shares for Ann and 26 for Martha (see accounts at end of agreed statement of facts, charges in 1856). In May, 1861, Mr. Lamar left New York and went to Savannah, where he remained through the war (statement

15 of facts). On December 4, 1861, he wrote to J. T. Soutter, at New York, directing that all of the Misses Sims stock, and that of certain other ladies, in the Bank of the Republic should be sold and the proceeds invested in the stocks of Southern cities or railroad corporations (see letter to Soutter, in statement). This was done, and the Southern securities deposited in Canada (see account sales of 235 shares in statement). In 1867, Benjamin H. Micou, of Montgomery, Alabama, was appointed, at Mr. Lamar's suggestion, by the Court of Probate of Montgomery County, Alabama, guardian of Ann C. Sims, then sixteen years of age. Lamar thereupon delivered to Micou the remnants of his wards' fortune, which included, among other things, certain bonds, one of the East Tennessee and Georgia
16 Railroad Company, two of the City of New Orleans, three of the City of Memphis, and five of the City of Mobile, with past due coupons attached, which were a part of those purchased with the proceeds of the sale of the Bank of the Republic stock (see receipt given by Micou, in statement). Micou was not then, and never has been, the legal representative of Martha M. Sims. She had died three years before in 1864, and her estate remained unrepresented until the appointment of Ann C. Sims as its administratrix in 1875. In the interlocutory decree in the Ann Sims case, the court directed that the guardian should have credit in the account in that case for the value of such securities when turned over to Benjamin H. Micou on May 24, 1867, and such value was accordingly charged in the account in
17 that suit under that date. No exceptions were ever filed nor objections made on the ground that these items, instead of being entered exclusively in the Ann Sims account, should have been divided equally between the two accounts, until after the entry of the final decrees.

The motion to vacate the final decrees and restate the accounts was denied. The appellant has not appealed from the order denying such motion, but has appealed from the decrees in both suits. This motion to dismiss is made in the Ann Sims case.

POINTS

First.—The amount involved in this appeal is less than $5,000. The decree in the original suit is for the recovery of $4,677.13. The decree in the cross-suit simply overrules a defense. The sum involved, therefore, is not sufficient to confer jurisdiction on this court, and the appeal should be dismissed.

Act of February 16, 1875, chap. 77, sec. 3; 18 Stat. at L., p. 315.
Banking Association *v.* Insurance Association, 102, U. S., 121.
Tintsman *v.* National Bank, 100 U. S; 6.
Troy *v.* Evans, 97 U. S., 1.
Thompson *v.* Butler, 95 U. S., 694.
Seaver *v.* Bigelow, 5 Wall., 209.

Second.—The motion to vacate the decrees and restate the accounts has no bearing on the question involved in this motion.

We understand that Judge Blatchford signed the allowance of the appeal and the citation, upon a theory of this kind—that this court might consider that he had been in error in denying the motion to vacate the decrees and restate the accounts, and that he would accordingly allow the appeal, and permit the papers on the motion to vacate the decrees to be returned as part of the record to this court, leaving the whole question of the appealability of the decree and of the correctness of his decision denying the motion to vacate it, to be determined by this court, on a motion to dismiss.

But, we submit that the papers on the motion to vacate the decrees ought not to have been returned to this court, and ought not to be considered upon this motion.

1. They constitute no part of the record. The record

21 closed with the entry of the final decree, which stands unreversed and in full force.

2. No appeal has been taken by the appellant from the order denying the motion to open the decree.

3. If such an appeal had been taken, it could not have been entertained by this court. No appeal lies to this court from an order denying a motion to open a decree. The question is purely discretionary with the court below.

Buffington *v.* Hawey, 95 U. S., 99.
Railway Co. *v.* Heck, 102 U. S., 120.

22 **Third.**—If, however, this court can properly take into consideration the merits of the motion to vacate the final decree, then the order denying such motion was correct and should be upheld.

1. The *laches* of the defendant in raising the question whether the charges should have been divided between the two accounts, instead of being entered exclusively in the Ann Sims account, was a bar to granting the motion.

The interlocutory decree entered in January, 1880, directed that the charges should be made in the Ann Sims account. The Master was therefore bound to make the charges in the Ann Sims account.

No objection to this direction in the interlocutory order
23 were ever made, and no exceptions were ever filed to the Master's accounts upon this ground. It was not until after the entry of the final decree in May, 1881, that the point was raised, although the accounts were subjected to severe scrutiny at every stage of the suit.

2. Upon the merits the charges were correctly made in the Ann Sims account, exclusively

It is true that the Bank of the Republic stock was originally purchased with the money of each of the wards. This bank stock, however, was an unauthorized investment for trust funds under the laws of New York, and could have been

repudiated by the wards on coming of age (*King* v. *Talbot*, 24
40 N. Y., 763; *Adair* v. *Brimmer*, 74 N. Y., 539). After the sale of this stock, the proceeds were mingled with that of other trust funds, and invested in securities of municipal and railroad corporations, not only without the State of New York, but within the actual seat of war.

Such an investment of trust funds was much more improper than the original investment in New York bank stock. There is, moreover, no proof that any of these Southern securities were ever set apart, or in any way distinguished so that they could be identified as the property of either of the Misses Sims. Indeed, as Martha Sims died in November, 1864, and as these securities, probably remained in Canada till the close of the war, it is probable that none of them were ever set apart as belonging to the 25
estate of Martha Sims. Lamar, therefore, was never entitled to any credit *for the investment* in these securities. They were of such a character that the wards could at any time have refused to accept them, and could have demanded their money with interest. The court, however, held that the delivery of these securities in 1867, to Benjamin H. Micou, the new guardian of Ann C. Sims, entitled Lamar to credit for their actual value at that time. This was not because the investment was legal, but because, although illegal, Lamar had parted with the securities, and was entitled to credit for what they were worth. But Micou was guardian for Ann C. Sims only, he did not legally represent Martha's estate. A payment to him, therefore, was no answer to a claim by the legal representative of Martha, and 26
accordingly the court was correct in directing in the interlocutory decree that the value of these securities should be charged exclusively in the Ann Sims account.

Fourth.—If but one suit had been brought resulting in the decree which has been entered in this case, no one would pretend that it was appealable. The adventitious circumstance that upon substantially the same facts another decree has been recovered which is appealable, although

presenting a striking illustration of the effect of regulating the right of appeal by the amount involved, cannot in law affect the question. If this case had remained in the State Court, the judgment could have been reviewed on appeal. It was removed into the Federal Court by the defendant. The condition of business in the United States Court has been such that a delay of about six years has resulted before a final decree has been reached. Meanwhile the young lady who began these suits has died in poverty, bequeathing this claim, which was everything she had, to her aunt, the present complainant, in grateful recognition of the support and care given to her and her sister after their mother's death in 1859. Under such circumstances we submit that the defendant having himself resorted to the United States Courts, must be bound by the statutes regulating their practice.

Fifth.—The motion to dismiss the appeal should be granted, with costs.

S. P. NASH,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

Original Suit No. 998.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED,

Complainant and Appellee,

vs.

G. DE ROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED,

Defendant and Appellant.

Cross Suit No.

G. DE ROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED,

Complainant and Appellant,

vs.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED,

Defendant and Appellee.

Brief for Appellant in Opposition to Motion to Dismiss Appeal.

EDWARD N. DICKERSON,
CHARLES C. BEAMAN, JR.,
Counsel for Appellant.

Evening Post Job Printing Office, 208 Broadway, N. Y.

Supreme Court of the United States.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED,
Complainant and Appellee,

vs.

G. DE ROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED,
Defendant and Appellant.

Original Suit No. 998.

G. DE ROSSET LAMAR, AS EXECUTOR, &C., OF GAZAWAY B. LAMAR, DECEASED,
Complainant and Appellant,

vs.

MARY J. C. MICOU, AS ADMINISTRATRIX, &C., OF ANN C. SIMS, DECEASED,
Defendant and Appellee.

Cross Suit No.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

The amount of the dollar judgment in this suit is less than five thousand dollars, and it is conceded that the jurisdiction of this court on this appeal could not be maintained if this

suit stood by itself, and was not so connected with the other suits between the same parties, which are next to it on the calendar of this court; that it is clear that, by reason of this connection, "the matter in dispute" in this suit (No. 998) exceeds "the sum or value of $5,000."

The Facts.

On petitions of appeal allowed by Judge Blatchford, four suits have been appealed to this court, two original suits and two cross suits, all of these four suits being, in effect, between the same parties, that is, between the estate of Gazaway B. Lamar and the estate of Ann C. Sims.

The estate of Mr. Lamar is represented by his executor; and the estate of Ann C. Sims, which consists of a claim in her own behalf and a claim in behalf of her sister Martha, is represented by Mrs. Micou, acting in one case as the executrix of Ann C. Sims and in the other case as the administratrix of Martha M. Sims; but as the papers show this Mrs. Micou is by the will of Ann C. Sims, entitled to herself have and receive whatever is recovered from the two claims. In 1855 Mr. Lamar was appointed the guardian in Richmond County, State of New York, of two sisters, Martha M. Sims and Ann C. Sims. Martha was the elder, and died in 1864, being then fifteen years old, unmarried, intestate, and leaving as her sole next of kin her sister Ann, who became of age in 1872 and died in May, 1876.

Mr. Lamar in 1855 received about five thousand dollars as the property of each of his wards, and invested it, in part, in the stock of the Bank of the Republic of the City of New York, of which bank he was the president, and, in part, in stock of the Bank of Commerce of Savannah and of the Mechanics' Bank of Augusta.

At the time of the breaking out of the War of the Rebellion, the Misses Sims, then orphans, were living with their grandmother, Mrs. Sims, and their aunt, Mrs. Micou, at Montgomery, Alabama.

Soon after the war began Mr. Lamar went to Georgia, and remained there during the war.

Fearing that the stock, which he held for the Misses Sims, of the Bank of the Republic of the State of New York, would be confiscated, these stocks, according to his directions, given by letter, were sold (p. 12), and the proceeds invested in "City stocks of the South, or guaranteed stocks of cities or railroad companies," and the bonds so bought were sent and placed on special deposit in the Bank of the People, Montreal, Canada (p. 13), where they remained until the close of the war. The property of the Misses Sims that Mr. Lamar had invested in the stock of banks in Savannah and Augusta and the investments that he made for his wards during the war in the State bonds of Georgia and in the bonds of the Confederacy all turned out valueless at the end of the war.

The Misses Sims only lived in the State of New York a few months after Mr. Lamar's appointment as their guardian in 1855, and in January, 1867, Mr. Lamar (p. 20) wrote to Miss Ann Sims, the surviving sister, and to her aunt, Mrs. Micou, (p. 20), stating in effect that he had saved of the property of the Misses Sims only the bonds that had been bought and sent to Canada, and adding :

"If Mr. Micou would undertake the guardianship, I would be glad to transfer it to him, as I am getting old, and it will be more convenient for him to attend to it, but he must be appointed by the court at her request."

This request was afterwards made and witnessed by the grandmother and by the aunt, Mrs. Micou, who wrote Mr. Lamar, thanking him for all that he had done and for what he had saved (see the letter, p. 21).

Mr. Micou was afterwards duly appointed guardian of the estate of Ann C. Sims, in the State of Alabama (p. 34), and on the 24th of May, 1867, Mr. Lamar delivered over to him all he had remaining of the property that he had received of his two wards, Ann and Martha, and for this Mr. Micou, as guardian, receipted (p. 25). The property so turned over included all the bonds that had been sent to Canada, and also the shares of bank stock that had stood in the names of Martha and Ann respectively (p. 26). Mr. Lamar had previously presented to Mr. Micou a complete statement of the accounts of Martha and of Ann with the wlf as guardian (pp. 24, and 30–33), in which accounts it

clearly appeared what investments he had made for each, and that on the death of Martha, he had, in effect, transferred whatever he held for her to Ann's account, giving her, Ann, credit for the dividends thereafter received on all the stock, and the accounts showed a balance of $808.70 as due her on the final accounting and turning over to her of the guardianship funds received by Mr. Lamar on account of herself and of her sister Martha, but considered by Mr. Lamar to have been held by him on her account alone, after the death of her sister.

At the time Mr. Micou became the guardian of Ann C. Sims, and received this property and gave this receipt, she was nearly sixteen years old, and she became twenty-one on June 1, 1872. Two years later, in July, 1874, Mr. Micou wrote Mr. Lamar (p. 27), asking, in behalf of Miss Sims, for another accounting and settlement, and in September Mrs. Micou, the present appellee, wrote her "Dear Uncle," Mr. Lamar, "I felt satisfied that, having undertaken the guardianship of my brother's children to please mother, and through regard for their father, you had in all things acted as you believed best for them. That this is Mr. Micou's opinion also, you cannot doubt; but as the only protector she has, he deemed it his duty, under the circumstances, to place the matter before you in a legal point of view, which he supposed you had never before thought of" (see the whole letter, p. 28).

At the time of the receipt of these two letters Mr. Lamar was sick in New York City, where he died on the 5th of October, it is to be hoped without ever having received the letter last quoted.

In July, 1875, Ann C. Sims began two suits against Mr. Lamar's estate, asking an accounting of his guardianship in one suit in behalf of herself, and in the other suit as administrix of her sister Martha.

After the suits were at issue, and before trial, Ann C. Sims died, bequeathing the claims in these two suits to her aunt, Mrs. Micou (see the will, p. 36). Mrs. Micou afterwards revived the two suits, one in the name of herself as administratrix of the will annexed of Ann C. Sims, and the other in the name of herself as the administratrix *de bonis non* of Martha M. Sims.

Afterwards the executor of Mr. Lamar filed a cross bill

each suit, and alleged in effect that Mrs. Micou was now the person who was the actual plaintiff and owner of the two claims, and that, by reason of her acts as to the original investments, and as to the turning over of the estate by Mr. Lamar to her husband, Mr. Micou, she was estopped from asserting either of these claims.

The cases were tried on an agreed statement of facts (p. 9), applicable to both cases, before Judge Choate, who, in substance, decided that Mr. Lamar's estate was liable for what he had received on account of each ward, subject to credit for what he had expended for each, and to a further credit for the value of the property he had turned over to Mr. Micou as guardian in 1867; and an accounting was ordered before a Master in the main suits, and the cross suits were ordered to be dismissed.

In the orders for the accounting (p. 56), the credit for the $808.70 paid over by Mr. Lamar to Mr. Micou, as the balance due on the two accounts, and the credit on account of the securities sent to Canada, were directed to be made in the accounting of the Ann C. Sims' estate, and nothing in the Martha M. Sims' estate.

It was not at the time considered by the defendants' counsel that this would make any difference in the rights of the parties, as it in no way affected the gross amount that would be received in both suits, or the parties who were to pay and receive the same. On the accounting, various questions arose as to whether Mr. Lamar's estate should be held liable for certain parts of the estate of the Misses Sims' which had not come into his hands, and as to the rates of interest to be allowed, and especially as to the value to be placed upon the securities that had been turned over to Mrs. Micou. The value of these securities had been admitted in the agreed statement of facts (note p. 20) to be about $2,648, and was finally fixed by the court upon the hearing of the arguments on the exceptions to the Master's report, at $6,631.61.

The fact that this sum was deducted or credited altogether in the suit in behalf of Ann C. Sims instead of having been credited, as it should have been, half in the suit in her behalf and half in the suit in behalf of her sister Martha, has produced the result, that while the amount received on account of the wards was originally the same, about $5,000, the judgment

in the Ann C. Sims' estate suit is for $4,677.13, and in the other suit for $18,957.82. The difference in these two amounts is produced almost entirely by the fact that the credit of about $6,631.61, the value of the investments turned over to Mr. Micou, and which were the investments made in behalf of the two wards is given in one suit, which should have been originally divided in the two suits, and this credit being given as of the date 1867, and the interest being added each year, the difference between the two claims increases from year to year.

After the entry of judgments in the two suits, the defendant's counsel learned that the plaintiff's counsel would object to the allowance of an appeal in the Ann C. Sims' estate, and on the ground that the judgment was for less than $5,000. Counsel for the respective parties went before Judge Blatchford and stated informally their position to him, and it was arranged that the defendant's counsel should present a brief to him later (p. 107), to show that the matter in dispute exceeded the sum or value of $5,000.

Afterwards Judge Blatchford granted an order to show cause why the judgment in the two suits should not be amended by crediting the sum of $6,631.61 half in each of the two suits.

In the argument of this motion, the defendant was allowed to file a petition for a rehearing and an amendment of the decree.

In accordance with this petition a rehearing took place, and full argument was made as to the propriety of the amendment. and also as to the allowance of an appeal. The amendment was not allowed.

The judge on the rehearing refused to allow the amendment (see the order, p. 108), but nevertheless allowed the appeal (p. 112.)

This he decided to do after oral argument made at the rehearing by counsel of the respective parties, and on presentation of argument in behalf of the present appellant, that the matter in dispute in the Ann C. Sims case is something more than the amount of the dollar judgment.

That other matter in dispute, in one statement of it, is simply how that $6,631.31 should be credited in the two suits. The devisee of the Ann C. Sims' claim does not now object that it should all be credited to that estate, for the same person is also the devisee of the Martha M. Sims claim, and the judg-

ment in that claim is made just so much larger as the other one is made smaller, and even if she should lose that larger judgment on appeal, she hopes that she can dismiss the appeal in the Ann C. Sims claim, and so secure the amount of that judgment.

If the Ann C. Sims claim and the Martha M. Sims claim were owned by different persons, we would not have the representative of the Ann C. Sims' estate here claiming that she should be credited with the whole $6,631.31.

But the crediting of this sum in the one case, or in the both cases, involves something more than the mere amount of dollars.

In Mr. Lamar's defense it was claimed that he had done his full duty by his wards. Judge Choate decided otherwise, and the question of the rightfulness of his decision in that respect is not answered in the argument of this motion, but it was also contended for the defendant, Lamar, before Judge Choate, that the turning over of the estate of his two wards to Mr. Micou, the new guardian, and the accounting he then made was a final and full release to him in both guardianships.

It was also then contended that this release, if at the time, by reason of the minority of Miss Ann C. Sims, it was not complete, yet it became complete when, for two years after attaining her majority, she acquiesced in it.

It was further then contended that now that Mrs. Micou had became the owner of both of these claims, she was estopped from asserting them by reason of the fact that she had approved of the original investments; had herself in writing approved the giving up of the guardianship to Mr. Micou, and the turning over to him of all the property, both of Martha and of Ann Sims.

Now, these defenses are all mainly connected with the turning over of the property to Mr. Micou, the new guardian, and with the way in which that property should be proportioned to the two claims, and with the effect of payment and apportionment upon the two claims.

Certainly, the amount of the dollar judgment and the matters in dispute are not in this case synonymous terms, and Judge Blatchford has so decided, with the facts all before him.

POINTS.

First.—*The matter in dispute exceeds the sum or value of* $5,000, *and the appeal should not be dismissed.*

In determining the sum or value of the matter in dispute, the court should and do look at all the circumstances of the case.

McCormick *vs.* Gray, 13 Howard, p. 26, p. 39.
Shields *vs.* Thomas, 17 Howard, 3.

It is not necessary upon this motion to refer fully to the record and argue the whole defense to the two claims, but, as showing the connection between the two suits and the matters in dispute involved in each, we make the following statement of what may be the result upon the appeal :

I.—The court may decide that this amount of $6,631.61 is to be credited equally in the two claims, and then, though the judgment in Martha M. Sims' claim, will be diminished accordingly, is there any way in which the judgment in the Ann C. Sims claim can be thus increased, if it has been dismissed on appeal?

II.—The court so deciding, may also decide that the rate of interest with which the defendant has been charged has been too high, and that that interest should not have been compounded, as it has been, for part of the period, but how can that correction be made unless the two suits are before the court?

III.—The court may decide that the turning over of the property to Mr. Micou was in behalf of two estates, and should be so credited, and further, that such turning over was a release to Mr. Lamar against any further claim by either estate, or by the Ann C. Sims estate, and not by the Martha M. Sims estate, or *vice versa*, and how can such judgment be carried into effect unless both suits are before the court.

IV.—The court may hold that the turning over of the

property to Mr. Micou was in behalf of the two estates, and should be credited equally between them, and further, that although such turning over was not, at the time, a release to Mr. Lamar against any further claim by either estate, it became so, as to both estates, or as to one or the other of them, by reason of the fact that Miss Ann C. Sims acquiesced in the same for two years after she became of age, and how can such judgment be carried into effect unless both suits are before the court.

V.—The court may hold that Mrs. Micou, the present claimant in right, is estopped from maintaining both, or the one or the other of these claims.

Now, in either of the cases above supposed, the court cannot carry out its decision without having before it both of the suits and judgments.

In the Ann C. Sims suit, the defendant denies that he owes the amount of the debt or judgment, or that he owes anything; but assuming that he is to account in that suit for what Mr. Lamar received for Miss Ann, he denies that he should have credit in that suit for what Mr. Lamar bought, held, and turned over as the property of Miss Martha, and by reason of the fact that this has been done, the matters in dispute in the Ann C. Sims suit are so connected with the matters in dispute in the Martha M. Sims suit, as shown above, that "the sum or value thereof" is more than $5,000.

Second.—*The proceedings upon the motion and petition for a hearing are properly a part of the record on appeal in this case.*

It is not contended on behalf of the appellant that there would be any appeal to this court from a refusal to allow a motion for a rehearing, but in this case a rehearing was allowed, and upon the precise point as to whether the decrees should be amended (see the order reciting the allowance of the rehearing and the denying of the amendment asked for, p. 108).

This rehearing and the denying of the amendment brought

before the judge in an especial manner the question of the proper division of the credit to be given for this sum of $6,631.61, and although the judge did not himself allow the amendment asked for, yet he must have been satisfied that the matter in dispute upon the rehearing and in the suit involves more than the sum or value of $5,000, and so allowed the appeal.

Third.—*This court cannot on this motion determine in what way this sum of* $6,631.61 *ought to be credited in the respective suits.*

To do so would necessitate the examination of the entire records in the four suits, and would involve a substantial investigation of all the defenses in the several suits, which the court will not do upon such a motion.

Fourth.—*The appeal in this suit and in the cross suit are taken together, and the motion to dismiss includes them both, and the amount or value involved in the judgment in the two suits is to be taken together in the determination of the question of jurisdiction.*

The cross suit not only raises the question as to whether or not Mrs. Micou is estopped for collecting the amount of the dollar judgment, but it also raises the question as to her right to have that judgment, as to which she is estopped, diminished upon the accounting by the allowance of a credit to Mr. Lamar on account of Ann C. Sims for what she, Mrs. Micou, acquiesced, in and approved as a payment made on account of the estates of the two wards, Martha and Ann, and not on account of the estate of Ann alone.

Fifth.—*The motion to dismiss this suit, with its cross suit, must be denied, with costs.*

This statute limiting the jurisdiction has been passed since the suits were brought. It was for the protection of the court against the increasing business. The actual dollar judgment herein is for $4,677.13, including $260.77 costs; and the security on appeal has been given by deposit of Government bonds in the Trust Company (p. 116). The parties in the four suits are the same, all the equities are the same, the printed records will be the same, except the representative character of the plaintiff in the two original suits will be different in name, but, in fact, in each she represents herself only, as the legatee of the two original suits. The question as to the actual matter in dispute in the four suits cannot be fully decided without an examination of the whole record and upon more full argument. No one can suffer by allowing the cases to remain as they are till the final hearing, and upon the presumption that Judge Blatchford decided rightly when he allowed the appeal, and because the four suits are so connected together that the matter in dispute in this one and in its cross suit, taken together or separately, involves more than the amount or value $5,000.

If, on final hearing, the court should, after an argument and examination of the whole record, determine that it has not jurisdiction in the Ann. C. Sims cases, it might then dismiss the appeal in those cases, even although it should reverse the decision of the court in the Martha M. Sims cases.

But the matter in dispute in the four cases will on final hearing, be found to be such that this court will maintain its jurisdiction in all the cases.

EDWARD N. DICKERSON,
CHARLES C. BEAMAN, JR.,
Counsel for Appellant.

December, 1881.

14-466

Jan. 26. 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~785.~~ 488 209

THE PEOPLE, EX REL. JOHN T. HANEMAN, PLAINTIFF IN ERROR,

vs.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 27, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 785.

THE PEOPLE, EX REL. JOHN T. HANEMAN, PLAINTIFF IN ERROR,

vs.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. John T. Hanemann, Plaintiff in Error,
against
THE BOARD OF TAX COMMISSIONERS OF THE City of New York, Defendant in Error.
} Affidavit of service.

A. B. Porter, one of the attorneys for plaintiffs in error, being duly sworn, doth depose and say that he did, on the 29th day of May, in the year one thousand eight hundred and seventy-eight, serve upon M. T. McMahon, receiver of taxes for the city of New York, at his office in said city of New York, a copy of a writ of error, with notice of filing of same endorsed thereon, of which the annexed is a copy, by delivering the same to said M. T. McMahon, and that he knew the party so served to be M. T. McMahon, receiver of taxes for the city of New York.

A. B. PORTER.

Sworn to before me, this 29th day of May, 1878.

THOS. KILVERT,
Notary Public, New York County.

2 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. John T. Hanemann, Plaintiff in Error,
against
THE BOARD OF TAX COMMISSIONERS OF THE City of New York, Defendant in Error.
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A. B. PORTER.

Sworn to before me, this 29th day of May, 1878.

THOS. KILVERT,
Notary Public, New York County.

3 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Justices of the Supreme Court of the State of New York, First Judicial Department, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Appeals of the State of New York, that being the highest court of law or equity of the said state in which a decision could be had in the proceeding between The People of the State of New York, ex rel. John T. Haneman, against The Board of Tax Commissioners of the City of New York, which record and proceedings have been remitted to the said supreme court, and judgment ordered thereon in said supreme court, in the office of the clerk of the county of New York, on the 20th day of May, 1878, wherein was drawn in question the right, privilege, and authority on the part of said board to assess for taxation the said Haneman, on the ground that such action on the part of said board was repugnant to and in conflict with article
4 1, sec. 8, clause 3, and article 1, sec. 10, clause 2, of the Constitution of the said United States, and the decision was in favor of said board on such question, a manifest error hath happened to the great damage of said Haneman, as is said and appears by his affidavit, contained in said record and proceedings.

We being willing that such error, if any hath been committed, should be duly corrected, and full and speedy justice done to said Haneman aforesaid in this behalf, do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, District of Columbia, together with this writ, so that you have the same before such justices on the second Monday of October next, that the record and proceedings aforesaid, being inspected, the said justices of the said supreme court may cause further to be done to correct such error what of right, and according to the law and custom of the United States, ought to be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the
5 Supreme Court of the United States of America, this the 23rd day of May, 1878.

[N. S. L. S.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Allowed this the 22nd day of May, 1878.

S. E. CHURCH,
Chief Judge of the Court of Appeals of the State of New York.

6 (Endorsed:) To the Board of Tax Commissioners of the City of New York: Take notice that the within is a copy of a writ of error this day served on and filed with the clerk of the

county of New York. May 28, 1878. Ulman, Remington & Porter, attorneys for plaintiff in error, 137 Broadway, N. Y. Due service of a copy of within and above this day duly admitted. May 29, '78. Wm. C. Whitney, corpo'n counsel.

(Endorsed:) Supreme Court of the United States. The People of the State of New York, ex rel. John T. Haneman, pltff. in error, agst. The Board of Tax Commissioners of the City of New York, respondent in error. Ulman, Remington & Porter, attorneys for plaintiff in error, 137 Broadway, N. Y. Copy. Writ of error.

7 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. John T. Hanemann, Plaintiff in Error,
against
THE BOARD OF TAX COMMISSIONERS OF THE City of New York, Defendant in Error.
} Affidavit of service.

A. B. Porter, one of the attorneys for the plaintiff in error, being duly sworn, doth depose and say, that he did, on the 29th day of May, in the year one thousand eight hundred and seventy-eight, serve upon and file with the clerk of the county of New York at his office in the City Hall in the city of New York, a citation on writ of error, of which the annexed is copy, by delivering the same to and leaving it with Edmund M. Plum, the representative of the said clerk of the county of New York, and that he knew the said Edmund M. Plum to be the representative of the clerk of the county of New York aforesaid. A. B. PORTER.

Sworn to before me, this 29th day of May, 1878.
THOS. KILVERT,
Notary Public, New York County.

8 UNITED STATES OF AMERICA, *ss.*

To the Board of Tax Commissioners of the City of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, at the Capitol therein, on the second Monday of October, 1878, at the opening of the court on that day, pursuant to a writ of error filed in office of the clerk of the county of New York, in the State of New York, dated the 22d day of May, 1878, granted in the name of the President of the United States of America and directed to the Justices of the Supreme Court of the State of New York, First Judicial Department, wherein The People of the State of New York, ex rel. John T. Haneman is plaintiff, and you are defendant in error, to show cause, if any there be, why

the decision and judgment in said writ of error mentioned should not be reversed or corrected and speedy justice done to the said Haneman in that behalf.

Witness, Hon. Morrison R. Waite, Chief Justice of the
9 Supreme Court of the United States, this the 23d day of May, 1878.

[SEAL.] S. E. CHURCH,
Chief Judge of the Court of Appeals of the State of New York.

10 (Endorsed:) Due service of a copy of the within is this day admitted. May 29, 1878. Wm. C. Whitney, corpo'n counsel. Notice. Original filed in N. Y. co. clerk's office, May 28, '78. Ulman, R. & P., plff's attys.

(Endorsed:) Supreme Court of the United States. The People, ex rel. John T. Haneman, plaintiff in error, vs. The Board of Tax Commissioners of the City of New York, defendant in error. Copy. Citation on writ of error. Ulman, Remington & Porter, attorneys for plaintiff in error, 137 Broadway, N. Y.

11 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. John T. Haneman, Plaintiff in Error, *against* THE BOARD OF TAX COMMISSIONERS OF THE CITY of New York, Defendant in Error. } Affidavit of service.

A. B. Porter, one of the attorneys for the plaintiff in error, being duly sworn, doth depose and say, that he did on the 29th day of May, in the year one thousand eight hundred and seventy-eight, serve upon and file with the clerk of the county of New York at his office in the City Hall in the city of New York, an assignment of error, of which the annexed is a copy, by delivering the same to and leaving it with Edmund M. Plume, the representative of the said clerk of the county of New York, and that he knew the said Edmund M. Plume to be the representative of the clerk of the county of New York aforesaid. A. B. PORTER.

Sworn to before me, this 29th day of May, 1878.
THOS. KILVERT,
Notary Public, New York County.

12 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, EX rel. John T. Hanemann, Plaintiff in Error, *against* THE BOARD OF TAX COMMISSIONERS OF THE City of New York, Defendant in Error. } Of October Term, 1878.

Afterwards, to wit, on the second Monday in October, 1878, in this same term, before the justices of the Supreme Court of the

United States, at the Capitol, in the city of Washington, comes the said John T. Hanemann, by his attorneys, Ulman, Remington & Porter, and says, that in the record and proceedings aforesaid there is manifest error in this, to wit, that the decision of the Court of Appeals of the State of New York in said proceedings should have been in favor of the plaintiff, and against the defendant, and to the effect that the said defendant erred in not granting the application of said plaintiff, set forth in said proceedings, for the reduction of the amount of the assessment made against him by said defendant, for the
13 reason that said assessment was in substance and effect the imposition by the authorities of the city, county, and State of New York of a duty or impost upon exports, and in conflict with and in opposition and repugnant to article 1, sec. 8, clause 3, and article 1, sec. 10, clause 2, of the Constitution of the United States.

And the said John T. Hanemann prays that the said decision, and the judgment entered thereon, be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of said judgment.

ULMAN, REMINGTON & PORTER,
Attorneys for Relator, 137 Broadway, New York.

14 (Endorsed:) Notice. Original filed in N. Y. co. clerk's office, May 29, '78. Ulman, R. & P., plff. attys.

(Endorsed:) Supreme Court of the United States of America. The People of the State of New York, ex rel. John T. Hanemann, plff. in error, agt. New York Tax Commissioners, deft. in error. Assignment of error. Ulman, Remington & Porter, 137 B'way, N. Y., attys. for plff. Due service of a copy admitted. N. Y., May 29, 1878. Wm. C. Whitney, corpo'n counsel.

15 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. John T. Haneman, Plaintiff in Error,
against
THE BOARD OF TAX COMMISSIONERS OF THE City of New York, Defendant in Error.
} Affidavit of service.

A. B. Porter, one of the attorneys for the plaintiff in error, being duly sworn, doth depose and say, that he did, on the 29th day of May, in the year one thousand eight hundred and seventy-eight, serve upon and file with the clerk of the county of New York, at his office in the City Hall in the city of New York, bond, of which the annexed is a copy, by delivering the same to and leaving it with Edmund M. Plume, the representative of the said clerk of the county of New York, and that he knew the said Edmund M. Plume

to be the representative of the clerk of the county of New York aforesaid.

A. B. PORTER.

Sworn to before me, this 29th day of May, 1878.

THOS. KILVERT,
Notary Public, New York County.

16 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. John T. Hanemann, Plaintiff in Error,
against
THE BOARD OF TAX COMMISSIONERS OF THE City of New York, Defendant in Error.
} Affidavit of service.

A. B. Porter, one of the attorneys for plaintiffs in error, being duly sworn, doth depose and say, that he did, on the 29th day of May, in the year one thousand eight hundred and seventy-eight, serve upon M. T. McMahon, receiver of taxes for the city of New York, at his office in said city of New York, a copy of a bond, with notice of filing of same endorsed thereon, of which the annexed is a copy, by delivering the same to said M. T. McMahon, and that he knew the party so served to be M. T. McMahon, receiver of taxes for the city of New York.

A. B. PORTER.

Sworn to before me, this 29th day of May, 1878.

THOS. KILVERT,
Notary Public, New York County.

17 Know all men by these presents, that we, John T. Haneman, Adolph W. Engler, and Henry A. Hurlbut, junior, all residents of the city of New York, in the State of New York, are held and firmly bound unto the Board of Tax Commissioners of the City of New York in the sum of five thousand dollars, to be paid to the said The Board of Tax Commissioners of the City of New York, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated at New York aforesaid, this the twenty-first day of May, 1878.

Whereas, the said The Board of Tax Commissioners of the City of New York having assessed the said John T. Haneman in and for the year 1876 upon the sum of $60,000, as being his funds invested in business within the State of New York, and a tax thereupon having been duly made and confirmed which, with the interest thereon, now amounts to $2,003.12.

And whereas the said Haneman duly appealed from such proceed-

ceedings by writ of certiorari to the general term of the
18 Supreme Court of the State of New York, the decision upon which sustained said proceedings.

And whereas, said John T. Haneman duly appealed from said decision to the Court of Appeals of the State of New York.

And whereas, the above-named John T. Haneman hath prosecuted a writ of error to the Supreme Court of the United States to reverse the decision of the said court of appeals in favor of the said The Board of Tax Commissioners of the City of New York against the said John T. Haneman, made upon said appeal, upon which decision and the remittitur from said court of appeals a judgment was duly entered in the Supreme Court of the State of New York in and for New York county in said state, for the sum of $135.64, respondent's costs, on the 20th day of May, 1878. Now, therefore, the condition of this obligation is such that if the above-named John T. Haneman shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his claim in said writ, then this obligation shall be void, otherwise to remain in full force and effect.

JNO. T. HANEMANN. [SEAL.]
AD. ENGLER. [SEAL.]
H. A. HURLBUT, JR. [SEAL.]

Signed and sealed in presence of—
THOS. KILVERT.

19 STATE AND COUNTY OF NEW YORK, *ss.*

Adolph W. Engler, one of the subscribers to the foregoing obligation, being duly sworn, says he is a resident and freeholder within this state, and is worth the sum of ten thousand dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

AD. ENGLER.

Sworn to before me, this twenty-first day of May, 1878.
THOS. KILVERT.
Notary Public, New York County.

STATE AND COUNTY OF NEW YORK, *ss.*

Henry A. Hurlbut, junior, one of the subscribers to the foregoing obligation, being duly sworn, says he is a resident of this state and is a householder therein, and is worth the sum of ten thousand dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

H. A. HURLBUT, JR.

Sworn to before me, this twenty-first day of May, 1878.
THOS. KILVERT,
Notary Public, New York County.

20 STATE AND COUNTY OF NEW YORK, *ss.*

On this the twenty-first day of May, 1878, before me, personally appeared John T. Haneman, Adolph W. Engler, and Henry A. Hurlbut, junior, to me personally known and known to me to be the individuals described in and who executed the foregoing obligation, and each for himself acknowledged to me that he executed the same.

THOS. KILVERT,
Notary Public, New York County.

(Endorsed:) To the Board of Tax Commissioners of the City of New York, Wm. C. Whitney, esq., counsel to the Corporation of the City of New York, and Martin T. McMahon, receiver of taxes of said city. Take notice that the within is a copy of a bond this day filed in the office of the clerk of the county of New York. May 28, '78. Ulman, Remington & Porter, attorneys for plaintiff in error, 137 Broadway, N. Y. Due service of a copy of within and above this day admitted. May 29, '78. Wm. C. Whitney, corpo'n counsel.

(Endorsed:) The People, ex rel. John T. Haneman, appellant, vs. The Board of Tax Commissioners of the City of New York, respondent. Copy. Security to stay execution. Approved May 22, 1878. S. E. Church, Chief Judge of the Court of Appeals of the State of New York.

21 N. Y. Supreme Court, First Department, General Term.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. John T. Haneman,
against
THE BOARD OF TAX COMMISSIONERS OF the City and County of New York.

Statement of Case.

John T. Haneman, a resident of New York city, was assessed by the tax commissioners of that city for the year 1876, in the amount of $60,000, on personal estate.

He duly appeared before such commissioners, as required by law, and applied for a correction of such assessment; whereupon such proceedings were had whereby the said commissioners refused to correct said assessment.

That *certiorari* was then issued to bring the whole proceedings before this court for review and determination.

The facts fully appear in the return and papers annexed thereto.

22 The People of the State of New York to the Board of Tax Commissioners of the City and County of New York.

Whereas, it appearing to us that you have assessed the personal estate, exclusive of bank stock, of John T. Haneman, a resident of

the county of New York, in the sum of $60,000, for the year 1876, and that application was duly made, in person, upon his affidavit, by said Haneman, for the remission or reduction of the same, on the ground that such assessment, except as to an amount of $5,500, was illegal, and in conflict with article 1, section 8, clause 3, and article 1, section 10, clause 2, of the Constitution of the United States, and that upon such application such proceedings were had by you whereby you refused to either remit or reduce such assessment, and that the same now exists in fact, form, and amount, as made by you as aforesaid.

And we being willing to be certified of said assessment, application and refusal to remit or reduce the same, and of all proceedings relating thereto—

Do command you that you certify and return into our supreme court, before our justices thereof, at a general term thereof, to be held at the new court-house, in and for New York county, in the city of New York, on the first Monday of October, 1876, at 10.30 A. M., at the opening of the court on that day, or as soon thereafter as counsel can be heard, the record of such assessment upon the personal estate of John T. Haneman aforesaid, the affidavit of said John T. Haneman, made upon said application to remit or reduce the same, and all proceedings had by you thereupon, touching and concerning the same, that our said court may act thereon, as of right and according to law, ought to be done.

23 Witness—Noah Davis, esq., presiding justice of our said supreme court, at the city of New York, the 12th day of June, 1876. By the court. WM. WALSH, *Clerk.*

{ L. S. / N. Y. Co. Clk. } ULMAN, REMINGTON & PORTER,
Attys. for Haneman, 137 *Broadway, N. Y.*

On the application, upon due notice, of Ulman, Remington & Porter, attys. for John T. Haneman, and upon the affidavit of H. C. Ulman, dated May 31st, 1876, I allow the within writ of *certiorari* to issue. CHAS. DONOHUE, *J.*

Dated June 12th, 1876.

To the Supreme Court of the State of New York:

The undersigned, Commissioners of Taxes and Assessments in the City of New York, pursuant to the *writ of certiorari*, hereto prefixed, respectfully certify and return—

That between the dates fixed by and according to law, the deputy tax commissioner assigned to that duty under our directions, did assess the personal estate of John T. Haneman, a resident of the city, county, and State of New York, at the sum of sixty thousand dollars, exclusive of bank stock, as appears by Schedule "A," hereto annexed, and entered the same in the book or books called "The

Annual Record of the Assessed Valuation of Personal Estate," for the year 1876, which are kept in our office, according to the provisions of the statute in such case made and provided.

That subsequently the said books were kept open, in our
24 office for inspection and review, pursuant to the statutes in such case made and provided, and notice of the fact that such books were so opened for examination and correction was published by us in the official journal, called the *City Record*, prior to and during the said time. And we also caused notices of such assessment, and of the time within which the same might, if erroneous, be corrected, to be given to the said John T. Haneman, personally, on or about the 10th of January, 1876, a copy of which is annexed, marked "1."

That on or about the 30th day of April, 1876, the said John T. Haneman applied to us to have the said assessment corrected, as stated in his affidavit of the 26th day of May, 1876, a copy of which is hereto annexed, marked Schedule "B."

That thereupon we duly considered the same and determined and decided upon the said application that the said valuation was made by us according to our best information, knowledge, and judgment in the premises.

And we further decided that the said personal estate was assessable for the said amount, as hereinbefore stated, and that the same was not exempt from taxation under the laws of this state, and the facts of the case or the Constitution and laws of the United States, and that in our opinion the said personal estate so assessed and valued was subject to taxation, and was justly and fairly valued at the said sum of sixty thousand dollars.

That thereafter we caused to be prepared from said books the assessment rolls in accordance therewith, and on the day as provided by law certified the same to be correct, and delivered the same to the supervisors of the county of New York.

In witness whereof, we have hereto subscribed our names, this 29th day of December, 1876.

JOHN WHEELER, [L. S.]
JOHN N. HAYWARD, [L. S.]
GEO. H. ANDREWS, [L. S.]
Commissioners of Taxes and Assessments.

25 Schedule "A."

Name.	Business.	Place of Business.	Residence.	Ward.	Valuation.
Haneman, John T.	Merchant.	53 Exchange pl.	44 W. 38.	21	$60,000 00

"1."

N. B.—Please bring this notice with you.
R. Book, line 3,405, page 237.

Mr. JOHN T. HANEMAN,
No. 53 Exchange Place.

DEPARTMENT OF TAXES AND ASSESSMENTS,
CITY HALL PARK, 32 CHAMBERS STREET, NEW YORK.
January 10, 1876.

You are hereby notified that your personal estate for 1876 is assessed at $60,000, exclusive of bank stock, and that the same, if erroneous, must be corrected before the commissioners, on or before the 30th day of April next, or it will be confirmed at that amount; from which there will be no appeal.

By order of the board.

ALBERT STORER, *Secretary.*

26 Schedule "B."

STATE, COUNTY, AND CITY OF NEW YORK, *ss.*

John T. Haneman, being duly sworn, says: He is a resident of the city, county, and state aforesaid, and was such resident on the 1st day of January last, and has so resided in New York aforesaid for the last past ten years.

That he has been assessed by the Board of Tax Commissioners for the City and County of New York, aforesaid, for the year 1876, as appears by the annexed notice, as such resident, upon his personal estate, exclusive of bank stock, to the amount of $60,000.

That the value and amount of all his personal estate on said 1st day of January, and at the present time, and ever since then, does not exceed the amount of $125,000.

That said personal estate is divided, used, and employed as follows, to wit: $4,500 thereof is invested in railroad bonds; $1,000 thereof is invested in household furniture.

All the rest and residue of said personal estate is continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the Customs Department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different states of said United States, and actually exported by deponent in said business, and for the payment of the expenses of shipping the same as such exports.

Deponent claims that all of his said personal estate so employed as last aforesaid, is exempt from assessment and taxation by said board of tax commissioners, and that the only part of his said estate upon which he claims he is liable to be assessed and taxed by said board is the sum of $5,500.

27 And deponent, being further examined by said tax commissioners, says that his said capital is invested uniformly

and continuously in cotton, the product of, and having a situs in various states outside of the State of New York, and in transit to the port of New York, and other Atlantic ports, for the sole purpose of exportation, and no portion of such cotton is intended to be, or is sold in New York, or any other United States market.

That deponent purchases cotton largely upon credit, and that of his capital, as much as $115,000 is continuously invested in cotton of the growth of the United States, which has been cleared at a custom-house, and is on shipboard in course of exportation to some foreign state or country.

That deponent presented himself to said tax commissioners before the 30th day of April last, and that at their request has again presented himself for examination.

(Signed) JNO. T. HANEMAN.

Sworn to before me, this 26th day of May, 1876.

(Signed) GEO. H. ANDREWS,
Commissioner of Taxes and Assessments.

NEW YORK COUNTY, *ss.*

H. Charles Ulman, being duly sworn, deposes and says, that on the 25th day of April, 1876, he attended, with John T. Haneman, of No. 53 Exchange Place, New York, as one of his attorneys, before the Board of Tax Commissioners of the City and County of New York, for the purpose of procuring the production or remission of an assessment of $60,000 made by said board upon the personal estate of said Haneman for the year 1876.

That thereupon application was duly then and there made by said Haneman for such reduction or remission, and that such proceedings were thereupon had before said board; that the said
28 Haneman, and deponent, as his said attorney, again appeared before said board, at the request of the same, on the 26th day of May, 1876, and then and there made further application for such reduction or remission upon an examination by said board, embodied in an affidavit, of which the annexed is a copy, the same being then and there retained by said board, and which is now in its possession, as deponent is informed and believes.

That the said application has been duly entertained by said board, as deponent is informed by George H. Andrews, esq., the president thereof, and that said board thereupon refused to reduce or remit the said assessment, or any part thereof, and that said assessment now remains on the books of said board against said Haneman for said amount of $60,000.

That deponent alleges that such assessment is illegal and erroneous, and that said board has no authority to impose the same, except on the amount of $5,500, in said affidavit mentioned, and that the facts upon which said allegation is based appear in said affidavit, in the possession of said board, and of which a copy is hereto an-

nexed, and that it therein appears that with the exception of the sum of $5,500 the said assessment is upon personal estate of said Haneman, invested and employed in goods exported by him from the United States of America, through its custom departments, to foreign countries, and is therefore illegal as being in conflict with article 1, section 8, clause 3, and article 1, section 10, clause 2 of the Constitution of the United States aforesaid.

H. CHARLES ULMAN.

Sworn to before me, 31st day of May, 1876.

THOS. KILVERT,
Notary Public, New York County.

29 *Order of General Term.*

At a general term of the supreme court, held in the new county court-house, in the city of New York, on the 31st day of March, 1877.

Present—Hon. Noah Davis, P. J.
" John R. Brady,
" Charles Daniels, JJ.

THE PEOPLE, EX REL. JOHN T. HANEMAN,
against
THE COMMISSIONERS OF TAXES AND ASments in the City of New York.

The writ of *certiorari* requiring the Commissioners of Taxes and Assessments in the City of New York to certify and return to this court the record of the assessment upon the personal estate of John T. Haneman, with the return of the respondents, having come on to be argued, and after hearing counsel for the respective parties, and due deliberation had, it is

Ordered that the proceedings brought up by the writ be, and the same hereby are, in all things affirmed, with costs.

(A copy.)

HENRY A. GUMBLETON, *Clerk.*

30 *Postea.*

Supreme Court, County of New York.

THE PEOPLE, EX REL. JOHN T. HANEMAN,
against
THE COMMISSIONERS OF TAXES AND ASments, in the City of New York.

The writ of *certiorari* requiring the Commissioners of Taxes and Assessments in the City of New York to certify and return to this court the record of the assessment upon the personal estate of John

T. Haneman, with the return of the respondents, having come on to be argued at the general term, and the said court having ordered that the proceedings brought up by the writ be, in all things affirmed, with costs;

Now, on motion of William C. Whitney, counsel to the corporation,

It is ordered and adjudged that the said proceedings of the commissioners be, and the same hereby are, in all things affirmed, and that the Commissioners of Taxes and Assessments, in the City of New York, do recover from the relator, John T. Haneman, the sum eighty-two dollars and four cents, for costs and disbursements, and that they have execution therefor.

31 *Notice of Appeal.*

Supreme Court, New York County.

THE PEOPLE, EX REL. JOHN T. HANEMAN, APPELLANT,
against
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF the City of New York, Respondents.

Take notice that John T. Haneman, above named, appeals to the court of appeals from the judgment of the general term of the supreme court in the above-entitled proceedings, entered in the clerk's office of the county of New York, on the 12th day of April, 1877, affirming with costs amounting to $82.04, the proceedings of the above-named respondents, assessing the personal estate in the city and county of New York of said Haneman, for the year 1876, brought up to said general term by a writ of *certiorari*, and from each and every part of said judgment.

Dated April 30th, 1877.

Yours, etc.,

ULMAN, REMINGTON & PORTER,
Attorneys for Relator and Appellant.

To WILLIAM C. WHITNEY, Esq.,
Counsel to the Corporation and Attorney for Respondents; and

To HENRY A. GUMBLETON, Esq.,
Clerk of the County of New York, and of the Supreme Court in and for the same.

32 Due service of the within notice of appeal is this day hereby admitted, and all irregularities as to form of notice are hereby waived.

Dated April 30th, 1877.

WM. C. WHITNEY,
Counsel to the Corporation and Attorney for Respondents.

Amended Notice of Appeal.

Supreme Court, New York County.

THE PEOPLE, EX REL. JOHN T. HANEMAN, APPELLANT,
against
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF the City of New York, Respondents.

Take notice that John T. Haneman, above named, appeals to the court of appeals from the order of the general term of the supreme court in the above-entitled proceedings entered therein and dated the 31st day of March, 1877, affirming with costs the proceedings of the above-named respondents, assessing the personal estate in the city and county of New York of said Haneman for the year
33 1876, brought up to said general term by a writ of *certiorari*, and from the judgment entered thereon on the 12th day of April, 1877, in the clerk's office of the county of New York, for $82.04 costs, and affirming such proceedings, and from each and every part of said order and judgment.

Dated April 30th, 1877.

Yours, etc., ULMAN, REMINGTON & PORTER,
Attorneys for Relator and Appellant.

To WM. C. WHITNEY, Esq.,
Counsel to the Corporation and Attorney for Respondents; and
To HENRY A. GUMBLETON, Esq.,
Clerk of the County of New York and of the Supreme Court in and for the same.

Due service of the within notice of appeal is this day hereby admitted, and all irregularities as to form of notice waved.

Dated April 30th, 1877.

WM. C. WHITNEY,
Counsel to the Corporation and Attorney for Respondents.

34 First Department, General Term, March, 1877.

Noah Davis, presiding justice.
John R. Brady and Charles Daniels, justices.

THE PEOPLE, EX REL. JOHN T. HANEMAN,
agst.
THE BOARD OF TAX COMMISSIONERS OF the City of New York.

Certiorari to review an assessment of the relator's personal property.

H. Charles Ulman, for relator.
J. A. Beall, for respondent.

Daniels, J.: The relator has been assessed the sum of sixty thousand dollars for personal estate owned by him.

He applied to the commissioners to vacate the assessment for the reason that his personal estate, amounting in the aggregate to the sum of one hundred and twenty-five thousand dollars, with the exception of the sum of five thousand five hundred dollars, consisted of money "continuously employed in the business of exporting cotton from the United States of America to foreign countries through the customs department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different states of said United States, and actually exported by
35 deponent in said business, and for the payment of the expenses of shipping the same as such exports." And it was further stated that as much of his capital "as $115,000 is continuously invested in cotton of the growth of the United States, which has been cleared at a custom-house and is on shipboard in course of exportation to some foreign state or country."

For these reasons, as they were set forth by the relator, it was claimed on his behalf that the assessment violated three provisions or the Constitution of the United States. The first of these provisions is that which has declared that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. The second provides that "no tax or duty shall be laid on articles exported from any state."

And the third has declared that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports," &c.—(Const. U. S., art. 1, sec. 8, sub. 3; sec. 9, sub. 5; sec. 10, sub. 2.)

The imposition of a tax upon capital can in no proper sense be affirmed to be a regulation of commerce. That has already been so frequently examined and uniformly declared as to render a particular discussion of the subject entirely needless. The authorities very clearly have determined that point against the relator in the present case.—(People vs. Commissioners of Taxes, 48 Barb., 157; 58 N. Y., 242; Lott vs. Mobile Trade Co., 43 Alabama, 578; Howell vs. State, 3 Gill, 14; Reading Railroad Company vs. Pennsylvania, 15 Wallace, 284.)

In the decision of the last case it was said "that a tax
36 upon any article of personal property that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid."—(Id., 294.)

The principal reliance of the learned counsel for the relator was not placed upon this provision for the purpose of sustaining the invalidity of the tax in question; but his chief dependence was upon the other two prohibitions of the federal Constitution.

It was very strenuously insisted that the tax contravened the provisions declaring that no tax or duty shall be laid on articles ex-

ported from any state, and no state, without the consent of Congress, shall lay any impost or duties on imports or exports. No direct authority has been cited maintaining the position which has been taken, that the tax designed to be imposed upon the relator is a tax duty or impost upon exports. But a principle which will sustain it has been claimed to be deducible from the authorities in which it has been very justly held that the state taxes, laid, directly or indirectly, upon imports, were invalid, because they were forbidden by these provisions of the Constitution.

The first and the most notable of these cases is that of Brown vs. State of Maryland, 12 Wheaton, 419. But the tax or import in that case was, in terms, laid upon the business of the importer of foreign merchandise. The law required him to take out and pay for a license from the authorities of the state in order to permit him to carry on and transact the business of an importer. And that it was held the state had no power to do, because it was the same thing in effect as a tax upon the imports themselves.

37 And this case would be comprehended by the principle there maintained if a tax had been imposed upon the relator because of his business as an exporter of cotton. The case of The People vs. Moring, 3 Abb., Court of Appeals, 539, was held to be controlled by that authority, because the sales by brokers of foreign wines and ardent spirits, and all goods, wares, merchandise, and effects imported from any place beyond the Cape of Good Hope, and all other goods, wares, merchandise, and effects which were the production of any foreign country, were subjected to duties payable into the treasury of the state for its use.—(Id., 550.)

The tax was not distinguishable in its nature and effect from that condemned by the preceding authority. It acted directly upon the business of the importer, and it was, therefore, held to be nothing less than a tax upon the imports which might become the subjects of the sales designed to be regulated and controlled.

The case of Almy vs. State of California, 24 How., 169, was decided under a law of a similar character, enacted by the State of California. It, in terms, imposed a stamp tax on bills of lading for the transportation, from any point or place in that state to any point or place without the state, of gold or silver coin, in whole or in part, or gold dust, or gold or silver in bars or other form.—(Id., 172.)

For that reason it constituted a tax upon exports, and the law providing for it was held to contravene the provisions of the Constitution of the United States, which have been already cited.

The case of Low vs. Austin, 13 Wallace, 29, was a direct attempt to impose a tax upon the imports themselves, and
38 very much, of course, was held to share the fortunes of the preceding controversies upon the same subject.

The state law was held to be invalid, and the tax, for that reason, was set aside.

Each of these cases is clearly distinguishable from the one now

before this court. For the tax imposed was either upon the articles themselves or the business of the importer. For that reason it involved either a direct or indirect attempt to violate the provisions of the United States Constitution. But, in the present instance, nothing of that kind was intended. No assessment was made upon or of the property purchased and exported by the relator, nor upon the business in which he was engaged.

If that had been the design, the property he purchased or the business he carried on would in terms have been made the subject of the assessment. But instead of doing that not the remotest allusion was made in the commissioners' proceedings to either. It was his capital, as distinguished from what it might be invested in or from the business he transacted by means of it, which was made the object of the assessment. And that in no case has been held to be exonerated from state taxation by anything contained in the federal Constitution. The assessment was made alone upon it, simply as so much personal estate, without reference to the advantages which might accrue to the relator, by means of its profitable employment. That use of it was not proposed to be assessed or taxed.

It was regarded as it was in fact as so much property owned by him, and for that reason liable to taxation.

In that respect he was considered for the purpose of taxation in the same position as all the other inhabitants of the state owning personal property.

And he was assessed simply as its owner, and neither directly nor indirectly because of the uses he might make of it. This money, of which his estate consisted, was not an export, and not intended for exportation.

39 It was the property he purchased with it that acquired that character when it was placed upon its journey to some foreign country. And that it was no part of the proceedings complained of to interfere with or restrain. The assessment was made because the relator was the owner of the money, and not because he might by means of it become the owner of commercial commodities for exportation.

His liberty or ability profitably to use it was in no manner infringed, but he was left entirely free in that respect.

Taxation upon capital used in commercial pursuits is by no means a novelty under the laws of the state.

And where it has been restricted to that, it has not yet been considered a tax upon exports even when the capital has been used and employed in business of that description. The principle of construction as it has been invoked to shield the relator, if it should be sustained, is one of a widely extended character. And it has been so often infringed in the business operations of the country as hourly to have generated legal controversies, if in fact it had been deemed to have been sanctioned by these provisions of the Constitution.

They would not have failed to result in legal proceedings, if this principle had any foundation whatever for its support.

But actions of this description have not been instituted on that account.

And they can have been omitted only because a tax imposed upon capital was considered distinguishable from one upon the articles in which it might be invested by its owner for foreign exportation.

The agricultural and mineral products of the country have to a very large extent been purchased and moved by the investment and employment of the taxed capital of the exporter. And the imports made have been purchased and imported in a similar manner. And the right of neither has been deemed to be infringed or violated, because the capital employed had been taxed as so much property belonging to its owner.

40 If the relator can succeed, then it must follow that every person whose capital is wholly or partially employed in foreign commerce will be entitled to be relieved to a corresponding extent from taxation. And the same principle will practically comprehend the trade carried on between the states.

No more serious blow could be given to the power of the state to tax the property owned by its citizens. For so far as it should not be employed in mere local traffic, it would necessarily escape taxation. That would include all products shipped to foreign countries or transported from one state into another and all the importations made from abroad. So great an exemption as that has not been made by anything contained in the Constitution of the United States. It has merely exonerated the articles themselves which may be exported or imported, but not the capital by means of which the title to them may have been acquired.

The capital is one degree beyond the final limits of the prohibition that has been made upon this subject. The owner is protected in his title to it by the laws of the state in which he resides. And for that reason he becomes entitled to taxation on account of it. That principle includes all property existing under the laws and sovereignty of the state.

It was acknowledged in the justly memorable case of McCulloch *vs.* State of Maryland, 4 Wheat., 316, where it was held that the state might rightly tax the property owned within its limits by the United States Bank, while it could not the corporate functions of the corporation itself, because it was one of the fiscal agencies of the general government.

It was there declared that the people of a state "give to their government a right of taxing themselves and their property, and as the exigences of government cannot be limited, they prescribe no limits to the exercise of this right."—(Id., 428.)

41 And "the sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission."

And all subjects over which the sovereign power of a state extends are "objects of taxation."—(Id., 429.)

These general principles maintaining the power of state taxation were also sanctioned by the case of Gibbons *vs.* Ogden, 9 Wheat., 2; Waring *vs.* The Mayor, 8 Wall., 110, and Peireas *vs.* Commonwealth, 5 Id., 475, and Howel *vs.* The State, 3 Gill, 14, sustain the same position.

No authority has been found which would justify the court in extending exemptions from the power of state taxation so far as to relieve the relator from the effects of the assessment made upon his capital in this instance.

While the fair import of the terms used in the Constitution, and the construction given to them by the authorities in which they have been considered and applied, forbid such an extension of their legal effect.

As already suggested the assessment has been made merely upon capital and not upon the exports purchased and moved by its instrumentality, and for that reason it was sanctioned by the authority of which the several states have been left in the free exercise and employment.

No other reason was urged before the commissioners or this court, why the assessment made should be vacated. And as those already considered will justify no such result it follows that the proceedings brought up by the writ should be affirmed with costs.

42 At a special term of the supreme court, held in and for the city and county of New York, at chambers at the county court-house in said city, on the 12th day of April, 1878.

Present Hon'ble Charles Donohue, one of the judges.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL.
John T. Haneman,
against
THE BOARD OF TAX COMMISSIONERS OF THE CITY
and County of New York.

John T. Haneman, the above-named relator, having appealed to the court of appeals from the judgment of the general term of this court, bearing date the 12th day of April, 1877, which judgment was signed by the clerk of this court, and duly entered in his
43 office on the said 12th day of April, 1877, and said court of appeals having affirmed the judgment of this court,

Now, on reading and filing the remittitur from the said court of appeals, and on motion of Wm. C. Whitney, counsel to the corporation for the respondents, it is

Ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the respondents, the Board of Tax Commissioners of the City and County of New York, have execution thereon.

CH. DONOHUE, *J. S. C.*

(Endorsed:) Filed. April 12, 1878.

44 Supreme Court, City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. John T. Haneman, *against* THE BOARD OF TAX COMMISSIONERS OF THE CITY and County of New York.

The writ of certiorari requiring the Commissioners of Taxes and Assessments in the City of New York to certify and return to this court, at a general term, the record of the assessment upon the personal estate of John T. Haneman, having come on to be argued, with the return of the respondents; and the said general term, after due deliberation having ordered, by an order dated March 31st, 1877, that the said proceedings brought up by the writ be in all respects affirmed, with costs; and said John T. Haneman having appealed to the court of appeals from the judgment
45 of the general term of this court, bearing date the 12th day of April, 1877; and the said court of appeals having affirmed the said judgment with costs, and the costs thereon having been adjusted upon appearance at the sum of one hundred and thirty-five and $\frac{64}{100}$ ($135 $\frac{64}{100}$) dollars, now, on reading and the remittitur from the court of appeals, and on motion of Wm. C. Whitney, counsel to the corporation, attorney for the respondents, it is adjudged that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the judgment herein, dated April 12th, 1877, be, and the same is hereby, in all respects affirmed; and it is further adjudged that the respondents, The Board of Tax Commissioners of the City and County of New York, recover of the relator, John T. Haneman, the sum of one hundred and thirty-five and $\frac{64}{100}$ ($135 $\frac{64}{100}$) dollars for their cost and disbursements therein, and that they have execution therefor.

46 The answer of the justices of the Supreme Court of the First Judicial Department of the State of New York, within named.

A transcript of the record whereof mention is within made, together with all things touching or in anywise concerning the same.

We certify, under the seal of our said court to the justices of the Supreme Court of the United States within mentioned in certain schedules to this writ annexed, as within it is commanded.

Dated New York, Sept. 11, 1878.

By the court:

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

47 Court of Appeals.

STATE OF NEW YORK, *ss.*

Pleas in the court of appeals, held at the Capitol, in the city of Albany, on the 9th day of April, in the year of our Lord one thousand eight hundred and seventy-eight, before the judges of said court.

Witness, the Hon. Sanford E. Church, chief judge, presiding.
E. O. PERRIN, *Clerk.*

Remittitur, April 9th, 1878.

THE PEOPLE, EX REL. JOHN T. HANEMAN, APPELLANT,
against
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF the City of New York, Respondents.

48 Be it remembered, that on the 17th day of May, in the year of our Lord one thousand eight hundred and seventy-seven, The People, ex rel. John T. Haneman, the appellant in this action, came here into the court of appeals, by Ulman, Remington & Porter, his attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court.

And The Commissioners of Taxes and Assessments of the City of New York, the respondents in said action, afterwards appeared in said court of appeals, by William C. Whitney, their attorney.

Which said notice of appeal, and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. H. Charles Ulman, of counsel for the appellant, and Mr. J. A. Beall, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judg-
49 ment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the Supreme Court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices
50 thereof, &c. F. S. PERRIN,
Dep. Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *April 9th,* 1878.

I hereby certify that the preceding record contains a correct tran-

script of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] F. S. PERRIN, *Dep. Clerk.*

51 Supreme Court.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } *ss.*

I, Henry A. Gumbleton, clerk of the Supreme Court of the City of New York, do hereby certify that the above and foregoing are the original writ of error and citation, with acceptance of service endorsed thereon; that the copy of the bond hereto attached is a true copy of the original on file in my office. That on the 29th day of May, 1878, the attorneys for the plaintiff in error duly deposited in my office the annexed writ of error, together with a bond, of which the annexed is a copy thereof, which copies were thereafter duly delivered to Ulman, Remington & Porter, the attorneys for John T. Haneman, the within-named plff. in error. That I have compared the annexed copy of the record and proceeding in the above-entitled cause with the originals on file and of record in my office; and that it is a true transcript therefrom, and of the whole thereof, and that I return the same to the Supreme Court
52 of the United States, in obedience to the command of the annexed writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the supreme court, at New York city, this 11th day of September, 1878.

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

(Endorsed on cover:) New York. Sup. Court. No. 785. The People, ex rel. John T. Haneman, plaintiff in error, vs. The Commissioners of Taxes and Assessments of the City of New York. Filed 27th September, 1878.



OFFICE SUPREME COURT U.S.
FILED
JAN 17 1881
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 209.

The People ex rel. John T. Haneman,
Plaintiff in Error,
vs.
The Commissioners of Taxes and Assessments of the City of New York,
Defendant in Error.

Error to the Supreme Court of the State of New York for the First Judicial Department.

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

H. CHARLES ULMAN,
Counsel for Plaintiff in Error.

BURGOYNE, Law Case Printer (Law Telephone 590), 29 Rose Street.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1880.

No. 209.

THE PEOPLE *ex rel.* JOHN T. HANEMAN,
Plaintiff in Error,

vs.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK,
Defendants in Error.

Error to the Supreme Court of the State of New York for the First Judicial Department.

ARGUMENT FOR PLAINTIFF IN ERROR.

Statement of the Case.

In this case John T. Haneman, the plaintiff in error, a resident of the City of New York, was engaged in the business of purchasing cotton in the United States and exporting it to foreign countries through the Customs Department of the United States.

In 1876 the Commissioners of Taxes of the City of New York, under an *ad valorem* tax of the State of New York, assessed the personal estate of the plaintiff in error for taxation at $69,000.

An application was made to the Tax Commissioners for a reduction of the assessment to the sum of five thousand five hundred dollars ($5,500), upon the ground that the assessment, in excess of that sum, was in conflict with Article I., Sec. 8, Clause 3,

and Article I., Sec. 10, Clause 2, of the Constitution of the United States.

It is shown by Haneman's affidavit, set out on pages 11 and 12 of the Record, marked "Schedule B," that the total value of his personal estate amounted to $125,000, of which $5,500 was invested in the City of New York in railroad bonds and household furniture, and all the rest and residue of his said personal estate was continuously employed in the business of exporting cotton from the United States of America to foreign countries through the Customs Department of the United States, and that such employment consisted in purchasing and paying for the cotton in different States, and for the payment of the expenses of shipping the same; and that all the cotton in which his capital was invested was the product of and had a situs in various States outside of the State of New York, and was brought to the port of New York and other Atlantic ports for the sole purpose of exportation, and no portion of such cotton was intended to be or was sold in New York or any other market of the United States, but was actually exported by the plaintiff in error in the course of his business.

In addition thereto, it also appears by Haneman's affidavit that he purchased cotton largely upon credit; and that of his capital as much as $115,000 was continuously invested in cotton of the growth of the United States, which had been cleared at a custom-house and was on shipboard in course of exportation to some foreign state or country.

All his capital was used and all his liabilities were incurred in the conduct of his busineas as an exporter.

Upon the hearing before the Commissioners they refused to vacate any part of the assessments, whereupon the plaintiff obtained a writ of *certiorari* to review the decision of the Commissioners, returnable before the General Term of the Supreme Court of the State of New York, for the First Judicial Department. In March, 1877, after hearing by

the Supreme Court *in banc*, the Court affirmed the assessment of the Commissioners and rendered judgment against the plaintiff in error, Mr. Justice Daniels delivering the opinion of the Court (see pp. 15–20 of the Record). From this decision an appeal was taken to the Court of Appeals of the State of New York by the plaintiff in error, where, in April, 1878, the case came on for argument, and after hearing counsel for appellant and respondent, the Court of Appeals affirmed the judgment of the Supreme Court, without, however, rendering an opinion, and remitted the record and judgment to the Supreme Court of the State of New York for execution, from which Court the plaintiff has, by writ of error, brought the case to this Court.

I.

We claim as error the assessment of the personal property of the plaintiff in error in excess of $5,500, which was invested in products of the United States that had passed the Customs Department and were on shipboard, as being in conflict with and repugnant to Art. I., Sec. 10. Clause 2, and Art. I., Sec. 8, Clause 3, of the Constitution of the United States.

1st. Products of the United States that have passed the Customs Department, and are on shipboard in course of exportation to a foreign market, have become exports, and are no longer within the taxing power of a State.

To tax money invested in products of the United States that have passed the Customs Department is in effect laying an impost or duty on exports, and is in violation of the Constitution of the United States.

Const. U. S., Art. I., Sec. 10, Clause 2.
Brown vs. State of Maryland, 12 Wheaton, 419.
Low vs. Austin, 13 Wallace, 29.

2d. A tax on personal estate used and employed in the purchase of goods for export is doing indirectly that which is prohibited to be done directly.

Brown vs. State of Maryland, 12 Wheaton, 419.
Low vs. Austin, 13 Wallace, 29.

3d. A tax on capital used and employed in exporting products of the United States is in effect a tax on exports. It adds to the price of the export and produces a revenue for the State which the Constitution of the United States in plain terms prohibits.

Brown vs. State of Maryland, 12 Wheaton, 419.

4th. A tax on capital employed in commerce with foreign countries that is invested in products exported—not in the instruments of commerce—is an interference with the regulation of commerce. It destroys uniformity and makes the non-exporting but producing States tributary to the seaport States, and either taxes the producer by decreasing the price he obtains for his products, or increases the cost of the article to the exporter,

Brown vs. State of Maryland, 12 Wheaton, 419.
State Freight Tax, 15 Wallace, 232.

5th. A tax by State authority on money invested in products of the United States, in transitu from one State to another for the purposes of exportation, is an interference with the regulation of commerce which Congress alone has the power to regulate.

Const. U. S., Art. I., Sec. 8, Clause 3.
McCulloch vs. State of Maryland, 4 Wheaton, 316.
Gibbons vs. Ogden, 9 Wheaton, 1.

The principle involved in this case is so familiar to the Court, that we deem it needless to enter into any extended argument or to occupy the time of

this Court in the review of a question that has been so frequently the subject of judicial examination.

This Court was first called upon to place its interpretation upon the clauses of the Constitution under which we claim protection, in 1827, in the Case of *Brown vs. State of Maryland*, 12 Wheaton, 419. That decision established principles which have been followed by this Court in the consideration of every case touching upon the subject of State taxation in any manner, trenching upon imports or the regulation of commerce; and the rules of interpretation therein laid down have been sanctioned and sustained in every instance down to the present day.

We claim that these rules are applicable to the correlative subject of exports, and that this case cannot be distinguished from that of *Brown vs. State of Maryland*, as to the effect of the tax upon the exports themselves, for it has been held by this Court repeatedly that the constitutionality or unconstitutionality of a State tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid (State Freight Tax, 15 Wallace, 232).

"A duty on imports is a tax on the article which "is paid by the consumer."

"The constitutional prohibition on the States to "lay a duty on imports, a prohibition which a vast "majority of them must feel an interest in preserv- "ing, may certainly come in conflict with their "acknowledged power to tax persons and property "within their territory. The power and the restric- "tion on it, though quite distinguishable when "they do not approach each other, may yet, like "the intervening colors between white and black, "approach so nearly as to perplex the understand- "ing, as colors perplex the vision in marking the "distinction between them."

"Yet the distinction exists, and must be marked "as the cases arise."

"It is sufficient for the present to say, generally, "that when the importer has so acted upon the "thing imported that it has become incorporated "and mixed up with the mass of property in the "country, it has, perhaps, lost in its distinctive "character as an import, and has become subject to "the taxing power of the State."

Brown vs. State of Maryland, 12 Wheaton, 419.

We contend that this rule is the true criterion by which to measure the extent of the taxing power of the State applicable to the subject of exports, and that when the exporter has purchased products of the United States for exportation, the moment they are set apart as his property prepared for export in the shape and condition in which they are exported and started on their journey for the seaport, they have become exports, and cease to belong to that general mass of property in the State over which the taxing power may be exercised.

II.

But it is contended that the assessment in question is a tax upon personal estate, and that it is the capital that is taxed, and not the export.

Mr. Justice Daniels, in delivering the opinion of the New York Supreme Court (see page 18, fol. 38 of the Record), says: "*It was his capital as dis-* "*tinguished from what it might be invested in or* "*from the business he transacted by means of it,* "*which was made the object of the assessment.* And "that in no case has been held to be exonerated "from State taxation by anything contained in the "Federal Constitution. The assessment was made "alone upon it, simply as so much personal estate, "without reference to the advantages which might "accrue to the relator by means of its profitable

"employment. That use of it was not proposed "to be assessed or taxed.

"It was regarded, as it was in fact, so much prop- "erty owned by him, and for that reason liable to "taxation.

"In that respect he was considered for the pur- "pose of taxation in the same position as all the "other inhabitants of the State owning personal "property."

The statute of the State of New York, under which the assessment in question has been made, provides as follows:

"All lands and all personal estate within this "State, whether owned by individuals or by cor- "porations, shall be liable to taxation, subject to "the exemptions hereinafter specified."

1st Revised Stat. of New York, chap. 13, title 1, sec. 1.

The third section defines what is meant by the words "personal estate" and "personal property," as follows:

"The terms 'personal estate' and 'personal prop- "erty,' whenever they occur in this chapter, shall "be construed to include all household furniture; "monies; goods; chattels; debts due from solvent "debtors, whether on account, contract, note, bond "or mortgage; public stocks; and stocks in monied "corporations. They shall also be construed to in- "clude such portion of the capital of incorporated "companies, liable to taxation on their capital as "shall not be invested in real estate."

1st Rev. Stat., State of New York, chap. 13, title 1, Sec. 3.

By which it will be seen that there is no tax on capital, *as capital*, except as applied to incorporated companies.

By what possible theory, or by what line of argument, could the learned Judge convince himself that imports or exports did not represent capital,

did not represent the money value of the things exported or imported, or did not take the place of the money that was paid for the articles by the importer or exporter. Can it be possible that the technicalities of the Code of Civil Procedure of the State of New York have so far clouded and demoralized the perceptibilities of the judicial mind, that its Courts are blinded to the plainest and most simple of propositions, namely: that goods and chattels are the representatives of their money value, and that the owner of money cannot retain his money if he invests it in goods or chattels in any other way than that his money is represented by, or that the goods and chattels take the place of, his money invested.

In this case the plaintiff in error swears that his capital is continuously invested in exports, and that he purchases largely on credit in addition to his cotton that is beyond seas or on shipboard in course exportation, which he swears is at all times as much as $115,000; he is engaged in purchasing cotton in different States of the Union, and his capital is uniformly and continuously invested in cotton, the product of, and having a situs in various States outside the State of New York, and in transit to the port of New York and other Atlantic ports for the sole purpose of exportation.

Now, the State of New York through its Court of Appeals, in sustaining the opinion of Mr. Justice Daniels, holds that some part of his capital so invested and so employed must pay a revenue to the State and City of New York, for the reason that the owner is protected in his title to it by the laws of the State. In what sense can this protection be claimed to extend to his cotton on shipboard or beyond seas, or in transit to Atlantic ports? Is not the protection extended to his prorerty more properly the shield of the United States? But suppose we grant, for the sake of argument, that he is protected in his title to this amount of capital, as distinguished from the articles in which it may be invested, by the laws and excellent police of New York, how is

it possible to comprehend the precise point at which this protection begins and the point at which it ceases, for the learned Judge holds that the Constitution has merely exonerated the articles themselves which may be imported or exported, and not the capital by means of which the title to them may have been acquired. Now, suppose the plaintiff in error should purchase on credit a cargo of cotton at Memphis, Tenn., and should pay out all his capital for transportation in bringing his cargo to the port of New York for export, and at the port of New York it should be stopped in *transitu* by the party from whom it was purchased, how would the learned Judge apply his rule of capital being one degree removed from that in which it may be invested, or how would he recover the capital without holding the cotton, or a lien upon the cotton for the same. Would not the cotton represent the capital, or would the capital still be one degree removed from the cotton, and the cotton be represented simply by the bale. Is not the distinction made by the learned Judge more perplexing to the understanding than colors are to the vision.

If capital may be taxed as capital or personal estate, irrespective of its use or employment, why may it not be so taxed if invested in the loans of the United States. If capital is one degree removed from what it may be invested in, it follows that the Government loans, as such, may be exempt by law, and yet the capital invested, or the money paid for the loans, may be assessed and taxed by State authority as so much personal estate.

If a State may evade a plain provision of the Constitution by calling white black or black white for purposes of taxation, what shall prevent a State from laying a tax or duty on every bale of cotton passing through its territory for purposes of trade, while its Courts protest that it is a tax on the bale of cotton as personal property, and not a duty of tunnage.

III.

We contend that it is not material that the tax should be laid upon imports, as such, or exports, as such, but the test to be applied is, where does the tax ultimately rest; and if it can be shown that it rests either directly or indirectly upon imports or exports, whether laid in the shape of a tax upon the person or a tax upon personal estate, a tax upon capital or a tax upon the occupation, if it produces a revenue to the State, and the law is not made under the authority of Congress and the net proceeds of the tax returned to the treasury of the United States, it is a clear infringement of the Constitution.

Const. U. S., Art. I., Sec. 10, Clause 2.

This position is clearly sustained by *Brown vs. State of Maryland* (12 Wheaton, 419), *State Freight Tax Case* (15 Wallace, 232), *Nathan vs. Louisiana* (8 Howard, 73), *Almy vs. State of California* (24 How., 169), *Crandall vs. State of Nevada* (6 Wallace, 35). And also by *Low vs. Austin* (13 Wallace, 29), which is similar in principle to this case, for it was an attempt, under an *ad valorem* tax, by State authority upon personal property, to evade the provisions of the Constitution of the United States and tax money invested in imports.

It is conceded that a tax by State authority levied directly upon the cotton of the plaintiff in error would be an infringement of the Constitution; the question then recurs: Does a tax, indirectly levied upon the same property by taxing the money invested therein as part of the personal estate of the plaintiff in error, fall within the same rule. This is the true issue for which we contend, for if a tax levied upon personal estate invested in cotton that has passed the Customs Department, and is beyond the limits of the United States, is not an infringement of Art. I, Sec. 10, Clause 2, then it follows

that a tax levied by the United States upon the cotton, while in the port of New York, on shipboard awaiting a favorable tide, would not be an infringement of Art. I, Sec. 9, Clause 5, of the Constitution of the United States.

We are, therefore, hopeful that this Court will cut away the sophistries and illogical propositions advanced in support of the legality of the assessment, and will clearly define the limit of State taxation of capital employed in exports; and as the decision of the Court in this case will become a precedent with regard to the subject of exports in which the entire country is largely interested, and which forms the true basis of the financial and material prosperity of the United States, the duty devolves upon this Court of clearly defining the rights of the exporter and sustaining the limitations imposed by the Constitution upon the States and the United States from obtaining a revenue from exports.

All which is respectfully submitted.

H. CHARLES ULMAN,
Counsel for Plaintiff in Error.

SUPREME COURT U.S.
FILED
JAN 22 1881
JAMES R. SUPREME COURT CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE PEOPLE EX REL. JOHN T. HANEMAN,
Plaintiff in Error,
against
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK.
Defendants in Error.
No. 209.

BRIEF FOR THE DEFENDANTS IN ERROR.

WILLIAM C. WHITNEY,
Counsel to the Corporation.

J. A. BEALL,
Of Counsel for the Defendants in Error.

Supreme Court of the United States.

THE PEOPLE ON THE RELATION OF John T. Haneman,

Plaintiff in Error,

against

THE COMMISSIONERS OF TAXES AND Assessments of the City and County of New York,

Defendants in Error.

No. 209.

Error to the Supreme Court of the State of New York.

Brief for the Defendants in Error.

STATEMENT.

By the laws of the State of New York, the taxes imposed upon property in the City of New York for all purposes, whether State, County or City, are imposed by the Board of Aldermen of said City acting as the Supervisors of the City and County of New York.

The valuation of property for the purpose of taxation, is made by virtue of the laws of the State, chapter 302 of the laws of 1859, by the Commissioners of Taxes and Assessments. Preliminary or tentative valuations are made between

the first Monday of September and second Monday of January, alternately, by deputy Commissioners appointed and assigned to duty by the Commissioners, which are returned, entered in a record and under oath, to the Commissioners, on or before the second Monday of January in each year. Such books or records remain open for public inspection until the first day of May, when the books are closed for the purpose of making therefrom the Assessment Rolls, upon which the tax is levied by the Supervisors. While the records of assessed valuation are thus open for inspection, any person may object to the valuation of his property and apply to the Commissioners for the correction thereof. If the application is denied, a writ of *certiorari* to review the decision will be allowed by the Supreme Court of the State at any time prior to the delivery of the rolls to the Supervisors.

John T. Haneman, the plaintiff in error, is a resident of the City of New York, and engaged in the business of exporting cotton. In the year 1876, the Commissioners assessed his personal estate subject to taxation at $60,000.

He applied to them to reduce said assessment, stating that his personal estate did not exceed $125,000, of which $4,500 was invested in railroad bonds, and $1,000 in household furniture, and that "all the rest and residue of said personal estate is continuously employed in the business of exporting cotton from the United States to foreign countries;" that said employment consists in purchasing and paying for the cotton in different States, and actually exporting it, and that no portion of such cotton is intended to be or is sold in New York, or any other United States market, and claiming that he was liable to be assessed and taxed on only $5,500, and as to the remainder of said personal estate, a State tax thereon was: 1, a regulation of commerce, and 2, an impost or duty upon exports—and void as repugnant to the provisions of the Constitution of the United States. The Supreme Court and the

Court of Appeals of the State of New York, have both sustained the action of the Commissioners in disallowing the relator's claims.

POINTS.

First.

The power of the State to tax property within its jurisdiction is a sovereign power, essential to the existence of the State, and has no other limitations than such as are imposed by the Constitutions of the State and of the United States.

There are but two express limitations upon the taxing power of the State contained in the Constitution of the United States, viz. : that they shall not, without the consent of Congress, lay imposts or duties on imports or exports, or any duty on tonnage.

Art. 1, Section 10, Subd. 2.

There are other limitations upon this power which arises from the complex system of the Federal Government, and have their origin in the provisions that the Constitution and Laws of the United States, *made in pursuance thereof*, shall be *the supreme law of the land*.

Constitution, Art. 17, Subd. 2.
See McCulloch *vs.* Maryland, 4 Wheat., 316.
Gibbons *vs.* Ogden, 9 *id.*, 199.

But the original right of taxation was in the States, and they retain all the original right and power which they have not expressly surrendered in adopting the Constitution of the United States.

1 Story's Com., 716.
10th Amendment to the Constitution.

The relator's claim to exemption from taxation is based upon the limitations to the Constitution of the United States. It is not contended that the tax is in any way repugnant to the Constitution of the State.

Second.

The fact that a part or the whole of the relator's personal estate is employed in commerce, would not make an assessment of, and consequent tax upon such personal estate in common with all other property within the jurisdiction of the Commissioners, a regulation of commerce within the meaning of the Constitution of the United States.

The Constitutional provision is: "Congress shall have power" * * * "to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

Article 1, Sec. 8, Clause 3.

The assessment complained of here is for the purpose of a tax upon the relator's *personal estate*, not upon the business of exporting cotton or upon the cotton itself. The tax is laid upon all property within the jurisdiction of the Commissioners of Taxes and Assessments—that is, within the City and County of New York, in the State of New York—the relator pays it in common with all other residents of the City. That his personal estate is, in whole or in part, intended to be exported, or is the product of other States brought here for exportation, makes no difference. The tax is to be upon the personal estate, not upon the use which is to be made of it.

The question, what is a regulation of commerce within

the meaning of the Constitution? has frequently been considered by the courts.

Chief Justice Marshall says: "There is no analogy be-
" tween the power of taxation and the power of regulating
" commerce."

Gibbons *vs.* Ogden, 9 Wheat.

Where the State of Louisiana imposed an annual tax on each and every money or exchange broker, it was claimed that such a tax imposed on a broker who bought and sold only foreign exchange, was void as being a regulation of commerce within the meaning of the Constitution—the Supreme Court of the United States held that the tax was was not a regulation of commerce, and was a legitimate exercise of the taxing power of the State.

Nathan *vs.* Louisiana, 8 How., 73:

The court says, Mr. Justice McLean delivering the opinion: "It is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce."

"What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce?"

"And is the vendor of these products exempted from
" state taxation because they may be thus used? Is a
" tax upon a ship, as property, which is admitted to be
" an instrument of commerce, prohibited to a State?
" May it not tax the business of shipbuilding the same as
" the exercise of any other mechanical art? And also the
" traffic of ship chandlers and others who furnish the
" cargo of the ship and the necessary supplies?"

"There can be but one answer to these questions. No
" one can claim an exemption from a general tax on his
" business, within the State, on the ground that the pro-
" ducts sold may be used in commerce." (*Id.*, p. 80.)

The State of Pennsylvania imposed a tax on the *gross receipts* of railroad companies. The Reading Railroad Company made return of its receipts, showing,

(1.) Receipts from freight transported to points within the State; and,

(2.) Receipts from freight transported to points *without the State;*

And claimed that, as to the latter the tax was repugnant to the Constitution as a regulation of commerce.

It was held that the tax was *not* a regulation of commerce.

Railway Tax Cases, 15 Wall., 284.

Tax on Railway gross receipts.

In the opinion of the court, it is said: "It must be "admitted that a tax upon any article of personal prop- "erty that may become a subject of commerce, or upon "any instrument of commerce, affects commerce itself.

"If the tax be upon the instrument, such as a stage "coach, a railroad car, or a canal or steamboat, its ten- "dency is to increase the cost of transportation. Still it "is not a tax upon transportation or upon commerce, and "it has never been seriously doubted that such a tax may "be laid."

Id., 294.

In the Supreme Court of this State it was held, in 1867, that a steamship company was not exempt from taxation upon its capital invested in steamships engaged in foreign commerce, and that a tax thereon was not a regulation of commerce.

U. S. & Brazil S. S. Co. *v.* The Comm'rs, 48 Barb., 157.

The Court of Appeals also held that the Pacific Mail Steamship Company was taxable for its capital invested in steamships,

58 N. Y., 242,

and that decision has since been affirmed by this court, but not reported.

To the same effect in Alabama.

43 Ala., 578.

A State stamp duty on foreign bills is not a regulation of inter-State commerce.

Ex parte Martin, 7 Nev., 140.

The conclusion is irresistible, from the authorities cited, that the assessment and consequent tax in question would not constitute a *regulation of commerce* within the meaning of the Constitution.

Third.

The tax for which the relator's property has been assessed *is not an "impost or duty upon exports,"* within the meaning of the Constitution.

The provision of the Constitution is:

No State shall, without the consent of the Congress, "lay "any imposts or duties on imports or exports, except what "may be absolutely necessary for executing its inspection laws; "and the net produce of all duties and imposts laid by any "State on imports or exports shall be for the use of the "Treasury of the United States; and all such laws shall be "subject to the revision and control of Congress."

Art. I., Sec. 10, Subd. 2.

The tax is not intended to be laid upon exports, nor indeed upon articles intended to be exported, but upon the personal estate of the relator in common with all other property within the jurisdiction of the Commissioners.

The relator's cotton, if he had any at the time the assessment was made, was not assessed alone or by reason of its being an export or intended for exportation, but as a part, and together with the remainder, of his personal estate, and at the same rate and for the same purposes as all the other property within their jurisdiction.

It is to be observed that the relator does not say in his affidavit that *any portion of his personal estate, at the time* of assessment or of his application, consisted of cotton intended to be exported, but that *his capital was continuously employed in the business of exporting cotton* (fol. 18), and "is "*invested uniformly and continuously in cotton, the product* "*of, and having a situs in various States outside of the State* "*of New York, and in transit to the port of New York and* "*other Atlantic ports*" (fols. 19–20).

And again, "*that of his capital as much as* $115,000 *is con-* "*tinuously invested in cotton of the growth of the United* "*States, which has been cleared at a custom house, and is on* "*shipboard in course of exportation to some* foreign state or "*country*" (fol. 20).

The affidavit was made for the purpose of obtaining exemption from taxation, and we think upon inspection and comparison of the foregoing extracts it will be apparent that the relator did not mean to fail in his purpose by reason of unwillingness to make conflicting statements as to the nature of his property, if haply one of them might secure the desired boon of exemption from the payment of taxes to the Government that afforded him and his business protection; but he nowhere says that at that time any portion of his estate consisted of cotton which had become exports. He was engaged, he says, in the business of exporting cotton for sale in foreign ports.

At some point of time the cotton was converted into money or some other article, so that it is well nigh a physical impossibility that at any time all of his capital was actually represented by, and consisted of cotton. Indeed he does not say that it did *consist entirely of cotton;* for he says that some of it is employed or used "for the "payment of the expenses of shipping the same as such "exports" (fol. 19).

He does not say how much, but his whole capital is put at $125,000, and even, if his cotton is to be considered *for all purposes* as "exports," from the moment that he purchases it with the intention of ultimately exporting it, it may well be that he has $60,000 of personal estate which does not consist of cotton.

The relator's claim is very broad, it is substantially that every merchant engaged in the export trade is entitled to be exempted from taxation upon his entire capital employed in any way in the business, which would include the rent of his store or warehouse, the salaries of his clerks and agents, the wages of his porters, and, in fact, every item of expense connected with the business.

Upon the relator's own showing, therefore, the decision of the Commissioners was right. But upon what ground is it claimed that capital invested in exports may not be taxed as personal estate in common with other property at the same rate, in the same manner, and for the same purposes?

The relator says that the Constitution of the United States prohibits the taxation of exports, and that prohibition extends as well to the value of the articles as part of the owner's estate.

This seems to be a somewhat novel interpretation of the Constitution, and the burden is certainly upon the relator to establish it. The argument thus far has been that the same rule laid down as to the taxation of imports applies

fully to the case of exports, and Low *v.* Austin, 13 Wall, 29, is especially relied on.

The laws of California provided that all property within the State should be subject to taxation according to its value.

Low and other importing merchants in San Francisco received on consignment from parties in France wines on which they paid the duties, and which they then stored in their warehouse in the original cases.

The importers were assessed upon these wines as part of their personal estate for State, City and County taxes. The importers denied the constitutionality of the tax, the Supreme Court of California held that it was constitutional, and the Supreme Court of the United States reversed the decision of the State court.

The court says :

"The Supreme Court of California appears, from its "opinion, to have considered the present case as excepted "from the rule laid down in Brown *v.* The State of Mary- "land, because the tax levied is not directly upon imports "as such, and consequently the goods imported are not "subjected to any burden as a class, but only are included "as part of the whole property of its citizens which is "subjected equally to an *ad valorem* tax.

"But the obvious answer to this position is found in the "fact, which is in substance expressed in the citations "made from the opinions of Marshall and Taney, that the "goods imported do not lose their charaters as imports "and become incorporated into the mass of property of "the State until they have passed from the control of the "importer or been broken up by him from the original "cases. Whilst retaining their character as imports a "tax upon them, in any shape, is within the constitu- "tional prohibition."

Id., 34.

"There are provisions of the Constitution which prevent "one State from discriminating injuriously against the "products of other States or the rights of their citizens, "in the imposition of taxes, but where a State, except in "such cases, has the power to tax, there is no authority "in the court nor in the United States to control its action, "however unreasonable or oppressive. The power of the "State, except in such cases, is absolute and supreme."

Id., 34 and 35.

This rule is now sought to be applied to exports, and for that purpose the construction contended for is:

"That goods purchased or acquired, in any manner, for the purpose of export, are, from the moment of their acquisition, until, perhaps, the intention of exporting them is abandoned, exempt from taxation."

From the fact that for nearly ninety years no such claim was ever made, the presumption against its soundness is very great. It will, no doubt, be answered that the rule of exemption of imports from taxation as part of the capital of the importer was first determined in Low *v.* Austin. But such is not the case. Brown *v.* Maryland, 12 Wheat., established that rule quite as conclusively. It was not formulated in that case, because the case did not call for it; but it follows of necessity from the doctrine then declared.

That was the case of a license tax upon auctioneers who sold *imported goods*, which the court held to be unlawful as imposing a duty upon imports. The opinion was delivered by Chief Justice MARSHALL, and he puts the decision upon the ground that the importer purchases by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country. He says:

"The argument is supported by strong reason as well "as by the practice of nations, including our own. The "object of importation is sale; it constitutes the motive "for paying the duties; and if the United States possess "the power of conferring the right to sell as the considera- "tion for which the duty is paid, every principle of fair "dealing requires they should be understood to confer it. "The practice of most commercial nations conforms to "this idea. Duties, according to that practice, are "charged on those articles only which are intended for "sale or consumption in the country. Thus, sea stores, "goods imported and re-exported in the same vessel, goods "landed and carried overland for the purpose of being re- "exported from some other port, goods forced in by stress "of weather and landed, but not for sale, are exempt from "the payment of duties. The whole course of legislation "on the subject shows that in the opinion of the Legisla- "ture, the right to sell is connected with the payment of "duties."

Id., 442.

Brown *vs.* Maryland is the leading case upon this question, and has been followed with some distinctions in all the subsequent cases, and the right of exemption has been strictly limited to "imports in the original package, and in the possession and ownership of the importer."

Thus it has been held that merchandise in *original packages* once sold by the importer, is taxable as other property.

Pervear *vs.* Commonwealth, 5 Wall., 479.

The bay of Mobile being included within the statutory definitions of the port of Mobile, contracts for the purchase of cargoes of foreign merchandise *before or after* the arrival of the vessel in the bay, where the goods, by the

terms of the contract, are not to be at the risk of the purchaser until delivered to him in said bay, do not constitute the purchser an "importer," and the goods so purchased by him, though in the orignal packages, may be properly subjected to taxation by the State.

Waring *v.* The Mayor, 8 Wall., 110.

The City of Mobile, Alabama, imposed a tax on real and personal estate, *sales at auction* and *sales of merchandise*, &c., within the City. The plaintiff's auctioneers received goods and merchandise, the products of other States, and sold them in the original and unbroken packages, and refused to pay the tax, asserting that it was repugnant to the Constitution of the United States. The case came up on writ of error to the State Court.

It was elaborately argued by the Hon. John A. Campbell and P. Hamilton, for the plaintiffs in error, and by P. Phillips for the defendant. The opinion of the court was delivered by Mr. Justice MILLER, and the constitutionality of the tax was affirmed.

Woodruff *v.* Parham, 8 Wall., 129.

The court, after commenting upon Brown *v.* Maryland, as arising out of a statute of that State, taxing imports, by way of *discrimination*, concludes: "The case before us "is a simple tax on sales of merchandise, imposed alike "upon all sales made in Mobile, whether by a citizen of "Alabama or of another State, and whether the goods "sold are the produce of that State or some other. There "is no attempt to discriminate injuriously against the pro- "ducts of other States, or the rights of their citizens, "and the case is not, therefore, an attempt to fetter com- "merce among the States, or to deprive the citizens of "other States of any privilege or immunity possessed by "citizens of Alabama."

Id. 134.

In Waring *v.* The Mayor.

Mr. Justice CLIFFORD, delivering the opinion of the court, says: "Sales by the importer are held to be exempt "from State taxation, because the importer purchases, by "the payment of the duty, a right to dispose of the mer- "chandise, as well as to bring it into the country, because "the tax, if it were held to be valid, would intercept the "import as an import, in the way to become incorporated "with the general mass of property, and would deny it "the privilege of becoming so incorporated until it should "have contributed to the revenue of the State."

8 Wall., p. 122.

In the Railway Gross Receipts Tax Cases, Wall., 284.

It was held that the tax on gross receipts, including those for freight on articles imported and exported, was not a tax or duty on imports and exports.

The result of all the decisions upon the power of the State to tax imports, is that imported goods in the original packages or cases, and in the hands of the importer, are not subject to taxation by the States. But this exemption is lost as soon as they pass from the ownership the importer, and when the original package is broken up although the goods are still in the possession of the importer.

It is further clear that the exemption to which they are entitled is based, in a great measure upon the fact that *the importer pays a duty upon them to the United States, and thus acquires a right to dispose of them.*

Again, to arrive at the right construction and interpretation of this provision of the Constitution, the occasion and object of its enactment are to be considered.

The journal of the convention shows that much care was exercised in framing it, and that it was adopted after much opposition and by a very close vote.

In the original draft of the Constitution, as reported by the Committee of Five, the prohibition extended only to "imports," the amendment adding the words "or exports," was adopted by a vote of six States to five. New York and Rhode Island not being represented, the five States which voted in the negative were Connecticut, Maryland, Virginia, South Carolina and Georgia.

This vote, and the debates upon the ratification of the Constitution in the several States, make it evident that this provision was framed for two purposes, viz., to prevent the levying of tribute by the sea-board and commercial States upon those that were non-commercial, and to provide a definite source of revenue for the United States. This view of the occasion of the provision is stated by Mr. Justice MILLER in the opinion of Woodruff *v.* Parham:

"The restriction upon the right of the several States to "levy any imposts or duties on imports or exports was "imposed because of the fear felt by the consuming and "non-commercial States, that those who were maritime "and sea-board would impose taxes amounting to tribute "upon them."

* * * * * * * *

"It is also to be remembered that the convention was "here giving the right to lay taxes by the national "authority in connection with paying the debts and pro- "viding for the common defense and general welfare, and "it is a reasonable inference that they had in view, in the "use of the word 'imports,' those articles which, being "introduced from other nations and diffused generally "over the country for consumption, would contribute, in "a common and general way to the support of the "national government."

P. 133.

All of the reasons given for the construction placed upon the provision, are addressed to the case of imports, but not one of them applies to that of "exports," as contended for by the relator here.

1. The exporter pays no tax, duty, or custom to the United States by reason of which he acquires any right.

   On the contrary, the United States are expressly prohibited from laying a tax of any description upon exports.

   Art. I., § 9, Constitution.

2. The United States derive no revenue from them, which calls for protection against the States.

3. The tax is not laid upon exports as such, or by way of discrimination, but in common with all other property. Almy *vs.* California, 24 How., 169, was a case of such discrimination, as was expressly said by Mr. Justice BRADLEY in Pace *vs.* Burgess, 2 Otto, 377.

It yet remains to consider when the character of "exports" becomes attached to an article.

So far as affects the question of liability to taxation, we submit that it cannot be until the thing has been actually delivered on board or at the dock, or Custom House, for exportation.

The owner might purchase his goods and hold them for years, during which time he is required to pay no taxes upon them, or upon the capital invested, because at time some he designs or did design to export them.

The proper construction seems to be that no tax, duty or custom can be imposed on the thing exported as a condition of exportation, or by way of discrimination; but it surely was not intended to exempt one

business only from a liability to which all others are subject.

The Constitution has, in the language of the Supreme Court of New York, "merely exonerated the articles "themselves which may be exported or imported, but "not the capital by means of which the title to them "may have been acquired. The capital is one degree "beyond the final limits of the prohibition that had "been made upon the subject. The owner is protected "in his title to it by the laws of the State in which he "resides—and for that reason he becomes liable to tax- "ation on account of it."

It might as well be argued that a provision that the press shall be free would operate to exempt capital invested in a newspaper from taxation. It was once claimed, but the court promptly overruled the point.

14 La. Annual Reps., 816.

Unless the tax is one which is laid upon the article exported, or intended to be exported, or upon the exporter, as such and by way of discrimination, it does not come within the prohibition of the Constitution.

In re Rudolph, 2 Federal Reporter, 65.

Fourth.

The rule is that an exemption from taxation must be clearly made out. "Taxation is the rule and exemption the execep- "tion"—and there can be no presumptions in favor of the claim.

Bailey *vs.* Maguire, 22 Wall., 215.
Cooley on Taxation, 146.

Fifth.

The judgment of the Supreme Court of New York should be affirmed, with costs.

WM. C. WHITNEY,
Counsel the to Corporation.

J. A. BEALL,
Of Counsel.

Jan. 17, 1881.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1005.

THE TOWN OF LOUISVILLE, PLAINTIFF IN ERROR,

vs.

THE PORTSMOUTH SAVINGS BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 10, 1881.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said court, before you, between the Portsmouth Savings Bank and the Town of Louisville, a manifest error, hath happened, to the great damage of the said Town of Louisville, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the
2 second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said district, this 8th day of September, A. D. one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

[SEAL.]

J. A. JONES,
Clerk U. S. Cir. C't, South. Dist. Ill's.

(Indorsed:) 5827. U. S. Supreme Court. Portsmouth Savings Bank vs. Town of Louisville. Writ of error. Filed Sept. 8, 1881. J. A. Jones, cl'k.

3 *Placita.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the honorable Thomas Drummond, judge of the seventh judicial circuit, presiding judge of said court, and the honorable Samuel H. Treat, judge of said district, associate judge of said court, on Wednesday the 7th day of July, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth year.

J. A. JONES, *Clerk.*

PORTSMOUTH SAVINGS BANK
vs.
TOWNSHIP OF LOUSVILLE. } No. 5827. Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

4 The Portsmouth Savings Bank, a citizen of the State of New Hampshire, plaintiff in this suit, puts in its place Messrs. Scholes and Mather, its attorneys, against the Township of Louisville, a corporation existing under the laws of the State of Illinois, defendants, of a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 18th day of December, in the year of our Lord one thousand eight hundred and seventy-nine, came the said plaintiff, by its attorneys, and filed in the office of the clerk of said court its bond for costs in said cause, which said bond is in the words and figures following, to wit:

Bond for costs.

Circuit court United States of America, southern district of Illinois, January term, A. D. 1880, ss.

THE PORTSMOUTH SAVINGS BANK *vs.* THE TOWNSHIP OF LOUISVILLE. } In assumpsit. Damages $5,000.

5 We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 18th day of December, 1879.

SCHOLES AND MATHER.

(Indorsed:) Filed Dec. 18, A. D. 1879. J. A. Jones, clerk.

And afterwards, to wit, on the same day and in the year last aforesaid, there was issued out of said clerk's office a summons in said cause, directed to the marshal of said district to execute, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss.

6 The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon the Township of Louisville, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto Portsmouth Savings Bank of a plea of trespass on the case upon promises, to its damage, as it alleges, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this 18th day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and fourth year.

[L. S.] J. A. JONES, *Clerk.*

Marshal's return.

I hereby appoint W. S. Hill my special deputy to execute this writ. Dec. 22d, '79.

E. R. ROE,
U. S. Mar.

7 Executed this writ on the 26 day of Dec., 1879, by delivering a true copy thereof to J. M. Boyles, supervisor of the township of Louisville, the within-named defendant.

E. R. ROE,
U. S. Mar.,
By W. S. HILL,
Sp'l Dep'ty.

(Indorsed:) Filed January 5, A. D. 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 26th day of December, in the year last aforesaid, came the said plaintiff, by its attorneys, and filed in said clerk's office its narrative in said cause, which said narrative is in the words and figures following, to wit:

Narrative.

In the circuit court of the United States for the southern district of Illinois, of January term, A. D. 1880.

The Portsmouth Savings Bank, a citizen of the State of New Hampshire, plaintiff, by Scholes & Mather, its att'ys, complains of
8 the Township of Louisville, a body corporate and politic existing under the laws of the State of Illinois, and located in said district, the defendant.

Whereas said defendant, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and seventy-nine, at the place aforesaid, was indebted to the said plaintiff in the sum of six thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant at the special instance and request of the said defendant, and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant, and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said
9 plaintiff the said sum of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of six thousand dollars of like lawful money as aforesaid; and being so

found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of six thousand dollars. And therefore the plaintiff brings suit, &c.

By SCHOLES & MATHER, *Att'ys.*

a/c SUED ON.

The Township of Louisville to Portsmouth Savings Bank, Dr.

To money	lent & advanced		$6,000 00
"	"	paid out & expended	$6,000 00
"	"	had & received	$6,000 00
"	"	due on a/c stated	$6,000 00

Instruments sued on & to be offered in evidence; Coupons off bonds of said township issued in aid of the Sp. & Ill. S. E. R. W. Co.

(Indorsed:) Filed Dec. 26, 1879. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 5th day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty, the following proceedings were had in said court and entered of record in said cause, to wit:

Rule to plead.

PORTSMOUTH SAVINGS BANK
v.
TOWNSHIP OF LOUISVILLE. } T. No. 370. 5827. Assumpsit.

On motion of plaintiff, by Messrs. Scholes and Mather, its attorneys, the defendant, having been regularly served with process, is ruled to plead herein by Wednesday the 7th day of January, inst.

And afterwards, to wit, on Tuesday the 6th day of January, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Extension of rule to plead.

PORTSMOUTH SAVINGS BANK
v.
TOWNSHIP OF LOUISVILLE. } T. No. 370. 5827. Assumpsit.

On motion of defendant, by its attorneys, the rule to plead herein is extended to January 14th, inst.

And afterwards, to wit, on the 12th day of January, in the year last aforesaid, came the defendant, by its attorneys, and filed in said clerk's office its pleas in said cause, which said pleas are in the words and figures following, to wit.

Pleas.

In the circuit court, January term, A. D. 1880.

UNITED STATES OF AMERICA,
Southern District of Illinois:

THE TOWNSHIP OF LOUISVILLE
ats.
PORTSMOUTH SAVINGS BANK. } Pleas.

(1.) And the Township of Louisville, defendant, by W. J. Henry and Hagle & Finch, its attorneys, comes and defends the wrong and injury, when, &c., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

W. J. HENRY, AND
HAGLE & FINCH,
Def't's Att'ys.

13 (2.) And the defendant, the Township of Louisville, by W. J. Henry & Hagle & Finch, its attorneys, comes and defends the wrong and injury, when, &c., and says that the supposed coupons, the instruments sued on and to be offered in evidence as in plaintiff's declaration mentioned, are not its coupons and deed; and of this it puts itself upon the country.

W. J. HENRY, AND
HAGLE & FINCH,
D'f't's Att'ys.

(3.) And the defendant, the Town of Louisville, for a further plea in this behalf, says actio non, because it says that the said supposed coupons in plaintiff's declaration mentioned were executed by the supervisor of said township without warrant or authority of law; and of this the defendant, the Township of Louisville, puts itself upon the country.

W. J. HENRY, AND
HAGLE & FINCH,
D'f't's Att'ys.

STATE OF ILLINOIS,
Clay County:

James M. Boyles, supervisor of the Township of Louisville, in the county of Clay and State of Illinois, make oath and says that, upon his information and belief, the foregoing pleas (numbered one,
14 two, and three) of the said Township of Louisville are true in substance and in fact.

JAS. M. BOYLES,
Supervisor.

Subscribed and sworn to before me this 10th day of Jan'y, A. D. 1880.
[L. S.] RICHARD J. BURNS,
Clerk of the Co. Court.

(4.) And the defendant, for a further plea in this behalf, says actio non, because it says that the said coupons in plaintiff's declaration mentioned were executed by the supervisor of the Township of Louisville at the time, when, &c., without corporate authority and without warrant or authority of law, and because thereof are void; and this the defendant is ready to verify.

W. J. HENRY, AND
HAGLE & FINCH,
D'f'ts Att'ys.

(5.) And for further plea in this behalf to the plaintiff's declaration defendant says actio non, because it says that the said supposed coupons in plaintiff's declaration sued on were executed as interest coupons to certain township railroad bonds purporting to have been issued by said defendant in aid of the Illinois Southeastern Railway Company.
15 and were attached to and were part of said bonds when issued. And defendant avers that said bonds recite on their face that they were issued in pursuance of an election of the legal voters of the said Township of Louisville, held on the 10th day of November, 1868, under the provisions of a certain act of the general of the State of Illinois therein referred to. And the defendant in fact saith that the proposition voted on at the said election so in said bonds referred to was to make a donation to the said railway company in pursuance and under the provisions of an act of the general assembly of the State of Illinois, entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, by which said act it is provided that "if a majority of all the votes cast be for such proposition, the trustees of said town shall so certify the same to the clerk of the county court of the county wherein the said town is situated; and such county clerk shall, upon the application of the company, after the donation so voted by any such town shall have become due and payable, under the terms and conditions of the proposition upon which
16 said election was ordered, compute and assess upon all the taxable property in said town an amount sufficient to pay such donation, or any part or installment of the same so then being due and payable, and the taxes so collected shall be paid to the treasurer of said company." And the defendant in fact saith that by the provisions of said act under which the said election was held there was no power conferred on the people of the said Township of Louisville to vote on the question of issuing interest-bearing bonds, and that the execution of the said bonds and the said coupons in plaintiff's declaration sued on under the said act and in pursuance of the said vote was wholly without authority and in violation of law. Of all of which the said plaintiff had notice by the recitals on the face of said bonds; and the said coupons are null and void. And this the defendant is ready to verify. Wherefore, &c.

W. J. HENRY, AND
HAGLE & FINCH,
D'f't's Att'ys.

(6.) And for further plea in this behalf defendant says actio non,
17 because it says that the said supposed coupons in plaintiff's declaration mentioned were executed as interest coupons to certain township railroad bonds purporting to have been issued by said defendant in aid of the Illinois Southeastern Railway Company. And the defendant avers that the said supposed coupons were issued since the

adoption of the constitution of 1870, to wit, on the 5th day of January, 1871, and were not authorized by a vote of the people of the said township under existing laws prior to the adoption of the said constitution, and are null and void; and this the defendant is ready to verify, &c.

W. J. HENRY, AND
HAGLE & FINCH,
Deft's Att'ys.

(Indorsed:) Filed January 12, 1880. J. A. Jones, clerk.

And afterwards, to wit, on Friday, the 25th day of June, at the June term of said court, in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

18 *Order setting cause for hearing.*

PORTSMOUTH SAVINGS BANK
v.
TOWNSHIP OF LOUISVILLE. } T. No. 324. 5827. Assumpsit.

By consent of parties, by their attorneys, this cause is set for hearing on 29th day of June, inst.

And afterwards, to wit, on the 30th day of June, in the year last aforesaid, came the parties, by their attorneys, and filed in said clerk's office their stipulation in said cause; which said stipulation is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court, June term, A. D. 1880.

Stipulation as to replication.

PORTSMOUTH SAVINGS BANK
vs.
TOWN OF LOUISVILLE.

It is hereby mutually stipulated by and between the attorneys in the above-entitled cause that the special pleas shall be considered
19 replied to without the filing of formal replications, and said cause shall be tried as though issue was taken on said special pleas.

SCHOLES & MATHER,
Att'ys for Pl'ff.
W. J. HENRY, *Att'y for Def't.*

(Indorsed:) Filed June 30, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 7th day of July, in the year last aforesaid, came the parties, by their attorneys, and filed in said clerk's office their other stipulation in said cause; which said stipulation is in the words and figures following, to wit:

Stipulation as to facts in case.

In the circuit court, June term, A. D. 1880.

UNITED STATES OF AMERICA,
Southern District of Illinois:

THE PORTSMOUTH SAVINGS BANK
vs.
THE TOWNSHIP OF LOUISVILLE. } Assumpsit.

It is hereby mutually agreed by the parties to the above-entitled cause, for the purpose of this trial, & subject to objection by either party for inadmissibility, that the following are the facts of this case: That the supervisor and town clerk issued fifteen bonds of the denomination of one thousand dollars each, said bonds purporting to bind said Town of Louisville, and to have been issued under the charter of the Illinois Southeastern Railway Company, & amendment thereto, all of which will more fully appear by a copy of one of said bonds which it is agreed may be received in evidence and considered for whatever it is worth; that the coupons offered in evidence were attached to said bonds at the time they were issued and have been subsequently separated therefrom, and that B. J. Rotan, whose signature appears to *to* said bonds, was, at the time of signing the same, supervisor of the Town of Louisville, and that his signature to said bonds and coupons is genuine; and that the plaintiff is the holder of said coupons sued on, having purchased the same before due and paid value therefor, with no other notice than what the law and the recitals in the bonds contained, and whatever constructive notice he may be chargeable with reference to the records and files of said town, and the records and files of the county court; that the affidavit of Rotan, as supervisor for the registration of said bonds, may be read in evidence, subject to its legal admissibility, and that said bonds after the making of said affidavit were registered in the auditor's office of the State of Illinois. That there is no written evidence on file or of record in the office of the clerk of the Town of Louisville, or in the office of the clerk of the county court of the county of Clay, showing or tending to show that any election in said town with reference to making a donation of fifteen thousand dollars to the Illinois Southeastern Railway Company, either in money or bonds, prior to the first day of April, A. D. 1870, but that an election was held in to the township under the charter of the Illinois Southeastern Railway Company on the 10th day of November, 1868, for the purpose of voting municipal aid to said railway company in the sum of fifteen thousand dollars, to be paid to the said company in three annual installments of five thousand dollars (5,000.00) each, and to be raised by said township by taxation, as provided in said act of incorporation, and this is the only election, and the election referred to and recited in said bonds; that said supervisor and town clerk issued said bonds without other or different corporate action on the part of the electors of said town, or the board of town auditors, and that when they were so issued they were delivered by the supervisor and town clerk aforesaid to Thos. S. Ridgway, as president of the Springfield and Illinois Southeastern Railway Company; that at the time of the delivery of said bonds a receipt was taken by H. L. Lanchner, town clerk, from the said Ridgway, which said receipt is as follows:

LOUISVILLE, ILL., *Jan. 5th, A. D.* 1871.

Received of H. S. Lachner, clerk of Louisville Township, fifteen bonds issued by said township in aid of the Illinois Southeastern
23 Railway Company, the bonds of the denomination of one thousand dollars each, numbering from No. 1 to No. 15, inclusive. The first coupon, No. 1, was this day cut off and burned by B. J. Rotan, supervisor. There remains thirty-nine (39) coupons to each bond, and the first one due, for six months interest, is payable on the first day of April, 1871, each coupon calling for fifty dollars.

Interest falls due 1st April and 1st Oct. of each year.

THOS. S. RIDGWAY,
President of S. & Ill. S. E. R'y Co.

That the Springfield and Illinois Southeastern Railway Company was formed by the consolidation of the Illinois Southeastern Railway Company with the Pana, Springfield and Northwestern Railroad Company, and that said bonds were issued to the Springfield and Illinois Southeastern Railway Company after the consolidation, and that said consolidation took place in February, A. D. 1870.

SCHOLES & MATHER,
Att'ys for Portsmouth S'v'gs B'k.
W. J. HENRY, AND
24 HAGLE & FINCH,
Att'ys for Louisville Township, Def't.

(Indorsed:) Filed July 7, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the same day and in the year last aforesaid, came the parties, by their attorneys, and filed in said clerk's office their other stipulation in said cause, which said stipulation is in the words and figures following, to wit:

Stipulation waiving jury and as to moving cause to Supreme Court.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court, June term, A. D. 1880.

PORTSMOUTH SAVINGS BANK
vs.
THE TOWN OF LOUISVILLE.

It is hereby mutually agreed that the above-entitled cause shall be tried by the court without the intervention of a jury, and that either party shall have the privilege of removing said cause after de-
25 cision therein from said circuit court to the Supreme Court of the United States, without said party so removing the same being required to give security except for the cost of said Supreme Court, and that when said cause is so removed to the said Supreme Court that it shall be advanced under rule twenty of said Supreme Court and stand for hearing at the October term of said court, A. D. 1880, and that in case the decision of said Supreme Court shall be in favor of said plaintiff, then a certain decree entered in the circuit court of the State of Illinois within and for Clay County perpetually enjoining the collection

of a tax with which to pay said bonds and coupons shall be vacated and set aside; if, however, said decision of the Supreme Court shall be against the validity of said bonds, then said decree shall continue in full force and effect.

SCHOLES & MATHER,
Att'ys for Pl'ff.
HENRY & COOK,
Att'ys for Def'ts

(Indorsed:) Filed July 7, 1880. J. A. Jones, cl'k.

26 And afterwards, to wit, on the said 7th day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty, the following further proceedings were had in said court and entered of record in said cause, to wit:

Judgment.

PORTSMOUTH SAVING'S BANK, *v.* TOWNSHIP OF LOUISVILLE. } T. No. 324. 5827. Assumpsit.

This day comes as well the plaintiff, by Messrs. Scholes and Mather, its attorneys, as the defendant, by W. J. Henry, esq., and Messrs. Hagle & Finch, its attorneys, and the issue joined, by consent, is tried by the court, a jury being waived; and the court having heard the evidence and argument of counsel, finds the issue for the plaintiff, and assesses its damages at the sum of five thousand six hundred and
$5,603.36. three dollars and thirty-six cents.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of five thousand six hundred and three dollars and thirty-six cents, its damages aforesaid assessed,
27 together with the sum of thirty dollars and ninety-one cents, its costs and charges by it about its suit in this behalf expended, and that execution issue therefor.

Whereupon, on the same day and in the year last aforesaid, the defendant presented its bill of exceptions, which was signed and filed in said clerk's office, and is in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In circuit court, June term, A. D. 1880.

THE PORTSMOUTH SAVINGS BANK *vs.* THE TOWNSHIP OF LOUISVILLE. } Bill of exceptions.

Be it remembered that on the trial of this cause at the June term, A. D. 1880, of said circuit court, said cause was submitted to the court for trial by the parties, without the intervention of a jury (the Hon. Judges Drummond and Treat both sitting); and the plaintiff,
28 to maintain the issue on its part, proved, and the court specially

finds, that the supervisor and town clerk, on the 5th of January, A. D. 1871, issued fifteen bonds of the denomination of one thousand dollars each, said bonds purporting to bind said Town of Louisville, and to have been issued under the charter and amendment of the Illinois, Southeastern Railway Company, and that the following is a true copy of one of said bonds.

1.—*Copy of bond.*

UNITED STATES OF AMERICA.

Registered by auditor of public accounts. Principal & interest collected & paid by the treasurer of State of Illinois.

STATE OF ILLINOIS.

No. 3.] [Vignette.] [$1,000.

Louisville Township railroad bond.

Ten per cent. interest.

(Written in red ink on face of bond in large figures:) $1,000.

Know all men by these presents that the Township Louisville, in the county of Clay and State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said township
29 promises to pay, at the office of the treasurer of the county aforesaid, on the first day of April, A. D. 1890. The said township reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of ten per centum per annum, payable semi-annually, on the first days of April and October of each year, on the presentation and surrender of the annexed coupons. This bond is one of a series of bonds issued by said township to aid in the construction of the Illinois Southeastern Railway in pursuance of the authority conferred by an act of *of* the general assembly of the State of Illinois entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and an election of the legal voters of the aforesaid township, held on the 10th day November, 1868, under the provisions of said act.

In witness whereof the said Township of Louisville has caused these presents to be signed by its supervisor and countersigned by its clerk, this first day of April, 1870.

B. J. ROTAN, *Supervisor.*

H. S. LACHNER, *Clerk.*

30 (Indorsed on back:)

The Springfield & Illinois Southeastern Railway Company of the State of Illinois hereby guarantees the payment of the principal and interest of this bond at the American Exchange National Bank, in the city of New York, by virtue of a resolution of said company passed on the 13th day of April, A. D. 1870.

As witness the corporate signature and seal of said company hereto

affixed, by Thomas S. Ridgway, its president, this 21st day of April, A. D. 1870.

THE SPRINGFIELD AND ILLINOIS SOUTHERN RAILWAY COMPANY.
[L. S.] By THO'S S. RIDGWAY, *President.*

AUDITOR'S OFFICE, ILLINOIS,
Springfield, Jan'y 9, 1871.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

31 In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[L. S.] C. E. LIPPINCOTT,
Auditor P. A.

Plaintiff, further to maintain the issue on its part, proved, and the court specially finds, that the interest coupons offered in evidence were attached to said bonds at the time they were issued, and had been subsequently separated therefrom, and that B. J. Rotan, whose signature appears to said bonds and coupons, was, at the signing of the same, supervisor of the Township of Louisville, and that his signature to said bonds and coupons is genuine, and that the plaintiff is the holder of the said coupons sued on, having purchased the same before due and paid value therefor, with no other notice than is contained in the law and recitals in the bonds, and such constructive notice as it may be charg'able, with with reference to the record and files of said town and of the county court, and that the following is a true copy of one of said coupons, to wit:

32 *2.—Copy of coupon.*

Township of Louisville, county of Clay, State of Illinois, will pay to the bearer fifty dollars, at the office of the treasurer of Clay County, Illinois, on the first day of April, 1880, being six months' interest on railroad bond.

No. 3.] B. J. ROTAN, *Supervisor.*

(Written in red ink on face in large figures:) 20.
(Written on right and left side:) [$50.] [$50.]

The plaintiff, further to maintain the issues on its part, offered in evidence a certified copy of the sworn certificate of B. J. Rotan, as supervisor of Louisville Township, Clay County, Illinois, in relation to the registration of said bonds with the auditor of public accounts of the State of Illinois, which certificate is in the words and figures following, to wit:

3.—Copy of certificate as to registration of bonds.

STATE OF ILLINOIS,
County of Clay:

LOUISVILLE T., *January 9th*, 1871.

To the auditor of public accounts of the State of Illinois:

SIR: I hereby certify that the following-described bonds are entitled to registration in your office, under the provisions of the act entitled

"An act to fund and provide for paying the railroad debts of coun-
33 ties, townships, cities, and towns," in force April 16th, 1869, the bonds being numbered from No. 1 to No. 15, incl., for $1,000.00 each, dated 1870, Ap'l 1st, and payable 1st Ap'l 1890, being in all fifteen bonds, and amounting to $15,000.00, and bearing interest at the rate of ten per cent. per annum, payable semi-annually, on the 1st days of April & October. These bonds are issued by the Township of Louisville, in the county of Clay, and State of Illinois, to the Illinois Southeastern Railway Company, under and by authority of the provisions of "An act to incorporate the Illinois Southeastern Railway Company," approved February 25, 1867, and an act amendatory thereof, approved February 24, 1869, and by a vote of the people of said township at an election held on the 10th day of November, 1868; and I, as supervisor of said township, do hereby certify that all the preliminary conditions in the act "in force April 16th, 1869," required to be done to authorize the registration of these bonds, and to entitle them to the benefits of said act last referred to, have been fully complied with, to the best of my knowledge and belief.

34 B. J. ROTAN,
Supervisor of Louisville T'p, Clay Co., Ills.

Subscribed and sworn to by the said B. J. Rotan, before me, this 9th day of January, A. D. 1871.

C. A. BEECHER.
Notary Public.

Filed Jan'y 9th, 1871. C. E. Lippincott, auditor public accounts.

AUDITOR'S OFFICE, ILLINOIS,
Springfield, February 19th, 1880.

I, Thomas B. Needles, auditor of public accounts of the State of Illinois, do hereby certify that the foregoing and annexed instrument is a true, full, and correct copy of a certificate of B. J. Rotan, as supervisor of Louisville T'w'p, Clay Co., in relation to registration of bonds issued by said township to the Illinois Southeastern Railway Company, now on file in and forming part of the records of this office.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and year first above written.

[L. S.] T. B. NEEDLES,
Auditor Public Accounts.

35 (Indorsed): Filed July 7, 1880. E. A. Jones, clerk.

To the introduction of which in evidence the defendant then and there objected, and still objects, but the court admitted the same, and specially finds that said supervisor did file with said State auditor said sworn certificate, and thereupon said bonds were registered in said State auditor's office.

The plaintiff, further to maintain the issues on its part, offered in evidence the following certified copy of the town records of said town of Louisville, relating to a second election held in said township on the 2d day of July, 1870, concerning said donation by said township of said aid to said Illinois and Southeastern Railway Company of $15,000, to wit:

4.—Copy from town records of Town of Louisville.

The undersigned town officers and twelve freeholders of the Town of Louisville, in the county of Clay and State of Illinois, do state that a special town meeting is necessary to the interests of said town,
36 for the purpose of deciding by a vote of the legal voters of said town whether a special tax be levied for the payment of the sum of fifteen thousand dollars, donated by said town to the Illinois Southeastern Railway Company, or that bonds be issued for the payment of said donation. We would, therefore, request that immediate notice thereof be given, and that such meeting be held on the 2nd day of July, 1870.

Witness our hands this 18th day of June, A. D. 1870.

B. J. ROTAN, *Supervisor.*
H. S. LACHNER, *Town Clerk.*
FRANCIS APPERSON, *Justice of the Peace.*
WILLIAM H. HUDDLESON, " " " "
1. JAMES WILDERS, *Freeholder.*
2. D. C. HAGLE, " "
3. C. D. KENDALL, " "
4. L. F. RAYBURN, " "
5. G. W. HENRY, " "
6. F. B. HITCHCOCK, " "
7. S. L. BRYAN, " "
8. W. T. MONICAL, " "
9. JAMES J. SPRIGGS, " "
10. CH. A. STEINBRUCK, " "
11. T. J. FARRIS, " "
12. JAS. A. W. WALKER, " "

37 On the back of which appears the following:

Filed June 20th, 1870. H. S. Lachner, town clerk.

Special town meeting.

Whereas the supervisor, town clerk, and justices of the peace, together with twelve freeholders of the town of Louisville, have, in writing, filed in my office a statement that a special town meeting is necessary to the interests of said town, setting forth the object of the meeting.

The inhabitants, legal voters of the said town of Louisville, are therefore hereby notified that a special town meeting will be held at the court-house in Louisville, on the 2nd day of July, A. D. 1870, at 9 o'clock in the forenoon, for the purpose following, to wit:

To decide by vote whether a special tax be levied for the payment of the sum of fifteen thousand dollars donated by said town to the Illinois Southeastern Railway Company, or that bonds be issued for the payment of said donation, being the objects contained in said statement filed in my office.

38 Given under my hand, at Louisville, this 20th day of June, A. D. 1870.

H. S. LACHNER,
Town Clerk.

Poll-list of an election held at the court-house in the Town of Louisville, county of Clay, and State of Illinois, on the 2nd day of July, A. D. 1870, for the purpose of deciding by a vote whether bonds shall be issued or tax levied to pay the donation heretofore voted in aid of the Springfield & Illinois Southeastern Railway by the people of Louisville Township, in Clay Co., Illinois.

No.	Names.	No.	Names.
1.	Francis Apperson.	26.	Joseph Bostick.
2.	Joseph Holt.	27.	A. Wilson.
3.	L. S. Hopkins.	28.	J. Cleveland.
4.	John Fleshman.	29.	James Wilders.
5.	John Tanner.	30.	F. B. Hitchcock.
6.	M. H. Davis.	31.	H. H. Chesley.
7.	Wm. Kuhlig.	32.	D. L. Brewer.
8.	V. Leach.	33.	S. Lem. Lee.
9.	J. A. Erwin.	34.	Darling Long.
10.	John McCollum.	35.	George Minch.
11.	E. Hitchcock.	36.	Moses Snider.
12.	Wm. Foreman.	37.	T. J. Farris.
13.	G. W. Small.	38.	J. E. Spriggs.
	14. A. H. Clark.	39.	C. A. Steinbruck.
39	15. J. R. Cravens.	40.	Adolph Smith.
	16. G. W. Henry.	41.	J. H. Collins.
17.	Alex. Tuick.	42.	Chas. Wood.
18.	H. R. Neff.	43.	J. R. Ware.
19.	John Wood.	44.	J. W. Armstrong.
20.	C. D. Kendall.	45.	G. F. Blair.
21.	H. H. Rayburn.	46.	Wm. Bryan.
22.	D. C. Hagle.	47.	J. M. Gibson.
23.	J. Funk.	48.	R. D. Griffin.
24.	John Mattingly.	49.	W. C. Winans.
25.	Samuel Greenwood.	50.	S. R. Jones.
51.		53.	
52.		54.	

At a meeting of legal voters of Louisville Township, pursuant to a notice, held at the court-house in Louisville, Clay Co., and State of Illinois, on the 2nd day of July, A. D. 1870, for the purpose of deciding by vote whether bonds shall be issued or tax levied to pay the donation heretofore voted in aid of the Springfield and Illinois Southeastern Railway, by the people of Louisville Township, in Clay County, Illinois, the township clerk being absent, the meeting was called
40 to order by G. W. Henry; David L. Brewer was elected moderator, & H. H. Chesley & S. Lem. Lee was chosen clerks; G. W. Henry was chosen trustee to hold the bonds appropriated by the citizens of Louisville Township to the Springfield and Illinois Southeastern Railway Company.

The polls was then opened to receive votes for or against the propositions as above stated, when the vote stood as follows:

For bonds: 𝍸 𝍸 𝍸

LOUISVILLE, ILLS., *January 5th*, A. D. 1871.

Received of H. S. Lanchner, clerk of Louisville Township, this day, fifteen bonds issued by said township in aid of Illinois Southeastern Railway Company, the bonds of the denomination of ($1,000) one thousand dollars each, and numbering from No. 1 to No. 15, inclusive. The first coupon, No. 1, was this day cut off and burned by B. J. Rotan, supervisor. There remains (39) thirty-nine coupons to each
41 bond, and the first one due, for six months' interest, is payable on the first day of April, 1871, each coupon calling for $50.

Interest falls due 1st April and 1st Oct., of each year.

THOS. S. RIDGWAY,
President of S. & Ills. S. E. R'y Co.

STATE OF ILLINOIS,
Clay County, ss:

I, William David, clerk of the Town of Louisville, in the county of Clay and State of Illinois, do hereby certify that the above and foregoing is a true and correct copy of all the papers that was found in my office on file, and is all the matter of record found in my office pertaining to this matter.

Given under my hand and seal this 22nd day of June, A. D. 1880.

WILLIAM DAVID, [SEAL.]
Town Clerk of Louisville Township.

(Indorsed:) Filed July 7, 1880. J. A. Jones, clerk.

To the introduction of which said record and proceeding the de-
42 fendant then and there objected, which said objection was overruled by the court and said record and proceedings read in evidence; to which ruling of the court the defendant then and there excepted; and the court specially finds from said records that an election was held on the 2nd day of July, 1870, for the purposes in said record expressed.

The defendant, to maintain the issues on its part, offered evidence to show that there is no written evidence on file or of record in the office of the clerk of the Town of Louisville, or in the office of the clerk of the county court of the county of Clay, showing, or tending to show, that any election had been held in said town with reference to making a donation of fifteen thousand dollars to the Illinois Southeastern Railway Company, either in money or bonds, prior to the first day of April, 1870.

To the introduction of which evidence plaintiff at the time objected and still objects, but the court admitted the same, and specially finds that there was no written evidence of such character on file or of record in said offices prior to said date.

43 The defendant, to further maintain the issues on its part, proved, and the court specially finds, that an election was held in said township, under the charter of the Illinois Southeastern Railway Company, on the 10th day of November, 1868, for the purpose of voting municipal aid to said railway company in the sum of fifteen thousand dollars, to be paid to the said company in three annual installments of five thousand ($5,000) each, and to be raised by taxation by said township, as provided in said act of incorporation, and this is the election referred to in the recitals of said bonds.

The defendant, further to maintain the issues on its part, offered evi-

dence to prove that said supervisor and town clerk issued said bond' without other or different corporate action than said two elections, and without any action on the part of the board of town auditors of said town. To which evidence and its admission the plaintiff then and there objected and still objects, but the court admitted said evidence, and specially finds that the said supervisor and clerk, without other corporate action than said two elections, and without any action of the board of town auditors of said town, issued said bonds and coupons.

44 The defendant, further to maintain the issues on its part, proved that when said bonds and coupons attached were issued by said supervisor and town clerk they were delivered by them to Thomas S. Ridgway, as president of the Springfield and Illinois Southeastern Railway Company, and said supervisor and clerk at the time took a receipt from said Ridgway in the words and figures following, to wit:

5.—Copy of receipt for bonds.

LOUISVILLE, ILLS., *January 5th, A. D.* 1871.

Received of H. S. Lanchner, clerk of Louisville Township, this day, fifteen bonds, issued by said township in aid of Illinois Southeastern Railway Company, the bonds of the denomination of ($1,000) one thousand dollars each, an' numbering from No. 1 to No. 15, inclusive. The first coupon, No. 1, was this day cut off and burned by B. J. Rotan, supervisor. There remains (39) thirty-nine coupons to each bond, and the first one due, for six months' interest, is payable on the first day of April, 1871, each coupon calling for $50.

Interest falls due 1st April and 1st Oct. of each year.

THOS. S. RIDGWAY,
President of S. & Ills. S. E. R'y Co.

45 And the court specially finds that said bonds and coupons were so delivered by said supervisor and clerk, and said receipt so taken.

The defendant, further to maintain the issues on its part, offered evidence to prove that the Springfield & Illinois Southeastern Railway Company was formed by the consolidation of the Illinois Southeastern Railway Company with the Pana, Springfield and Northwestern Railroad Company, and that said bonds were issued to the Springfield and Illinois Southeastern Railway Company after the consolidation, and that said consolidation took place in February, A. D. 1870.

To the admission of which evidence plaintiff at the time objected and still objects, but the court admitted the same in evidence, and specially finds that said Springfield and Illinois Southeastern Railway Company was formed by the consolidation of the Illinois Southeastern Railway Company withthe Pana, Springfield and Northwestern Railroad Company, and that said bonds were issued to the Springfield & Ill-

46 inois Southeastern Railway Company after the consolidation, and that said consolidation took place in February, A. D. 1870.

To which special finding the plaintiff then and there objected and still objects.

Which was all the evidence on either side.

Whereupon the court found for the plaintiff and assessed its damages at the sum of five thousand six hundred and three dollars and thirty-six cents.

To which finding and ruling of the court the defendant excepted. And inasmuch as the matters aforesaid do not appear of record, the counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court, and made part of the record in said cause, and it is done accordingly.

THOMAS DRUMMOND. [SEAL.]
S. H. TREAT. [SEAL.]

(Indorsed:) Filed July 7, 1880. J. A. Jones, clerk.

47 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Illinois in Circuit Court, ss:

I, John A. Jones, clerk of the circuit court of the United States for the southern district of Illinois, do hereby certify that the foregoing is a true copy of the papers filed, and the proceedings thereon had, in a certain cause lately pending in said court wherein the Portsmouth Savings Bank was plaintiff and the Township of Louisville was defendant, as fully as the same appear of file and record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 16th day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth year.

[SEAL.] J. A. JONES, *Clerk.*

48 United States of America to the Portsmouth Savings Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the Town of Louisville is plaintiff and you are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, district judge of said district and one of the judges of said circuit court, this 8th day of September, A. D. 1881.

S. H. TREAT,
U. S. Dist. Judge.

I hereby accept service of the foregoing citation this 8th day of September, A. D. 1881.

SCHOLES & MATHER,
Att'y for Def't in Error.

(Indorsed:) 5827. Portsmouth Savings Bank vs. Town of Louisville. Citation.

49 The Township of Louisville, plaintiff in error, complains that error has intervened in the foregoing record and proceedings, and that the errors are in these:

1st. The court erred in rendering judgment for the plaintiff and against the defendant.

2nd. The court erred in admitting in evidence and basing its findings

upon the record of an election held on the 2nd day of July, 1870, and after sec. 2 of article 14 of the constitution of the State of Illinois took effect.

3rd. The court erred in holding that an election held on the 2nd day of July, 1870, was not within the prohibition of section 2 of article 14 of the constitution of 1870 of said State.

4th. The court erred in finding that there was due the plaintiff
50 the sum of $5,603.36, there being no finding of the court that bonds and coupons to that amount was held by the plaintiff.

5th. The court erred in holding that the election of the 10th Nov., 1868, and the amendatory act of 1869, conferred authority upon the supervisor and town clerk to issue the bonds.

The plaintiff in error therefore prays that said cause be reversed.

W. J. HENRY,
Att'y for Pl'ff in Error.

(Indorsement on cover:) No. 1005. The Town of Louisville, plaintiff in error, vs. The Portsmouth Savings Bank. S. Illinois C. C. U. S. Filed October 10, 1881.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1070.

THE UNITED STATES, APPELLANT,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 15, 1881.



SUPREME COURT OF THE UNITED STATES.

No. 1070.

THE UNITED STATES, APPELLANT,

vs.

THE PACIFIC MAIL STEAMSHIP COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

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1 I.—*Petition.*—*Filed Oct.* 6, 1875.

In the Court of Claims.

PACIFIC MAIL STEAMSHIP COMPANY
vs.
THE UNITED STATES. } No. 10705.

To the honorable justices of the Court of Claims:

The Pacific Mail Steamship Company respectfully represents—

1. That it is a corporation duly organized under the laws of the State of New York, and having its principal place of business in the city of New York.

2. That on the 23d day of August, 1873, a contract was, in pursuance of section three of the Post-Office Department appropriation act of Congress of June 1, 1872, duly executed between said company and the United States (a copy of which is annexed to and made a part of this petition), by which it was agreed as follows:

3. That said company should transport, in the manner in said contract particularly described, the mails of the United States between the ports of San Francisco and Hong Kong, in China, touching at Yokohama, Japan, both on the outward and inward passages, to land and receive mails, with a regular connecting branch line of steamers between Yokohama and Shanghai, China, twelve round trips per annum, by an additional monthly line of first-class steamships, to conform, in all respects, to the requirements and provisions of said third section of the act of Congress of June 1, 1872, and the advertisement of the Postmaster-General, issued in accordance therewith, dated June 5, 1872, and of sufficient number to perform the required additional monthly service for and during the term of ten years, commencing on the first day of October, 1873.

4. That the steamships thereafter offered for the aforesaid service should be of not less than four thousand tons register each, built of iron, and with their engines and machinery wholly of American construction, of the best materials, and after approved models, and so con-

2 structed as to be readily adapted to the armed naval service of the United States in case of war, and should be kept up and maintained fully equal to the best state of steamship improvement attained.

5. That said company should carry the United States mails, during the existence of their contracts, without additional charge, on all the steamers they might run upon said line, or any part of it, or any branch or extension thereof.

6. That the United States should pay for said services in transporting, as aforesaid, the mails of the United States, when performed, the sum of $500,000 per annum (being at the rate of $41,666.66 for each round voyage), in quarterly payments, on the receipt, at the Post-Office Department, of satisfactory evidence of the performance of the round voyages embraced in said payments; said compensation, however, to be subject, in case of failure from any cause to perform any of the regular monthly voyages, to a pro-rata reduction on account of such omitted voyage or voyages, and to be subject also to reductions, fines, and penalties which might be imposed by the Postmaster-General for failures and irregularities, as in said contract particularly stipulated.

7. That said contract might at any time be terminated by Congress.

8. That said company, on or before the first day of October, 1873, commenced the transportation of the mails of the United States between the ports of San Francisco and Hong Kong, Yokohama, and Shanghai, by an additional monthly line of first-class steamships, conforming in all respects to the requirements of the law, advertisement, and contract aforesaid, and continued said transportation until and after the close of the quarter ending June 30, 1875.

9. That at the time of the passage of said act of June 1, 1872, and of the making of said contract thereunder, said company was already under contract with the United States, dated October 16, 1866, made under act of Congress of February 17, 1865, for a monthly mail service for ten years from about January 1, 1867, between the same ports and at the same annual compensation; and said act of June 1, 1872, and said contract were intended and expressed to secure a similar additional monthly mail on said route upon the same conditions and limitations prescribed by said act of February 17, 1865, and by said contract of October 16, 1866, made in pursuance thereof, thus making the whole service semi-monthly at the rate of one million dollars per annum.

10. That prior to the 20th of February, 1875, said company transported said mails, under the said contract of August 23, 1873, in steamships which had been theretofore accepted by the United States
3 for said mail service, under said contract of October 16, 1866, and in other steamers running upon said line, or branches, or extensions thereof, as contemplated by said act of June 1, 1872, and said contract thereunder; and performed said service with only the omitted voyages, failures, delays, and irregularities unavoidably or naturally incident to such extended ocean navigation, and, as the company believes, to the satisfaction of the Postmaster-General.

11. That on the 8th day of July, 1874, the City of Peking and the City of Tokio, two new steamships of over 5,000 tons register each, build of iron, and with their engines and machinery wholly of American construction, of the best material, and after approved models, and so constructed as to be readily adapted to the armed naval service of the United States in case of war, which had been erected for said company solely for the purpose of continuing, during the ten years aforesaid, the additional monthly mail service under said contract, were offered to the United States for acceptance, and to be thereafter used in said service.

The question whether said contract of August 23, 1873, was an existing agreement, and the United States bound to inspect said steamships, and accept them for service under said contract, if found to comply with the requirements of law, was, on the 22d of July, 1874, submitted by the Postmaster-General to the Attorney-General, and the latter, on the 3d of August, 1874, rendered his opinion that said contract was obligatory upon the United States, and in full force and effect, and that said company was entitled to have said steamships inspected, and, if accepted, placed in said additional mail service.

The steamships were thereupon, August 7, 1874, duly inspected, and found to comply in all respects with the law of June 1, 1872, and on the 8th of August, 1874, were formally accepted by the Postmaster-General for said additional monthly service, and duly entered into such service, which, after February 20, 1875, and to the close of the quarter ending June 30, 1875, was performed in said steamships, and in steamships of the character heretofore described, to the satisfaction of the Postmaster-General, as said company believes.

The City of Peking, while engaged in said service, sailed from San

Francisco February 20, 1875, carrying the additional monthly mail to Yokohama, Hong Kong, and Shanghai, reaching San Francisco with said mail on her return voyage April 28, 1875.

12. That by act of Congress of March 3, 1875, it is provided that so much of the aforesaid act of June 1, 1872, "as relates to and authorizes a contract to be made by the Postmaster-General with the Pacific Mail Steamship Company for steamship service between San
4 Francisco, Japan, and China, is hereby repealed, and any such contract made by the Postmaster-General in pursuance of said act is hereby annulled."

13. That there is due to said company from the United States, under said contract of August 23, 1873, seven quarterly payments, accruing between October 1st, 1873, and the close of the quarter ending June 30, 1875, at the rate of $500,000 per annum, amounting to $875,000, less such pro-rata deductions on account of omitted voyages, and such fines and penalties for delays or irregularities, as may be found to be due in accordance with the contract. The number of omitted voyages for which deductions should be made, as said company estimates and believes, is eight, which, at $41,666.66 per voyage, amount to $333,333.33. Evidence of the performance of the round voyages embraced in the payments above claimed, and of the compliance by said company with all the provisions of said contract, was duly furnished to and is now in possession of the Post-Office Department, and the Postmaster-General has been requested to approve and cause to be audited the amount due said company for service between the aforesaid dates, in accordance with said contract, which he declines and refuses to do.

Wherefore the company prays that a judgment may be rendered in its favor for five hundred and thirty-one thousand six hundred and sixty-six dollars and sixty-six cents ($531,666.66).

THE PACIFIC MAIL STEAMSHIP COMPANY,
By J. B. HOUSTON,
2nd Vice-President.

NEW YORK, *September 30th*, 1875.

5 The undersigned, J. B. Houston, a resident of New York City, and 2nd vice-president of the Pacific Mail Steamship Company, hereby makes oath that no assignment or transfer of the foregoing claim of said company against the United States, or any part thereof, or any interest therein, has been made; that said company is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

J. B. HOUSTON.

Sworn before me this 30th day of September, 1875.
[NOTARIAL SEAL.] GEO. E. WEED,
Notary Public, N. Y. County.

WM. E. CHANDLER,
Attorney for Claimant.

The post-office address of the claimant is New York City, and of its attorney, Washington, D. C.

(Indorsment:) 10705. Pacific Mail Steamship Company v. The United States. Original petition filed Oct. 6, 1875. J. R.

6 This article of contract, made the twenty-third day of August, in the year of our Lord one thousand eight hundred and seventy-three, between the United States of America (acting in this behalf by their Postmaster-General) and the Pacific Mail Steamship Company, with George H. Bradbury and Rufus Hatch, esquires, as sureties, witnesseth:

That whereas the said Pacific Mail Steamship Company were heretofore accepted, in accordance with the stipulations and provisions of sections 3 and 6 of the act of Congress approved June 1, 1872, entitled "An act making appropriations for the service of the Post-Office Department for the year ending June 30, 1873," and in conformity with the advertisement inviting proposals for said service issued by the Postmaster-General of the United States on the 5th day of June, 1872, as contractors for the conveyance of an additional monthly mail on the mail steamship route between the port of San Francisco and the port of Hong Kong, China, via Yokohama, Japan, with a regular branch line running in connection with the main line between Yokohama and Shanghai, China, at the sum of five hundred thousand dollars for the performance of twelve round trips per annum, for a term of ten years from and after the first day of October, eighteen hundred and seventy-three, and upon the same conditions and limitations as prescribed by existing acts of Congress in reference thereto, and the respective contracts made in pursuance thereof;

And whereas the said Pacific Mail Steamship Company, on the 29th day of August, 1872, entered into articles of contract with the United States of America, acting in that behalf by their Postmaster-General, for the conveyance of the said mails in conformity with the provisions and stipulations of the said act of Congress, with Alden B. Stockwell and Henry Clews, esquires, as its sureties in the said contract;

And whereas the said Pacific Mail Steamship Company have desired to procure the discharge and release of the said Stockwell and Clews as the sureties for the company under said contracts, and have offered to substitute therefor George H. Bradbury, of Englewood, New Jersey, and Rufus Hatch, of the city of New York, esquires, as sureties in their stead;

And whereas the United States, acting by their Postmaster-General in this behalf, have consented and agreed with the said company to accept and receive the said George H. Bradbury and Rufus Hatch as sureties for the performance and service to be rendered by the said steamship company under said contracts, in lieu of said Stockwell and Clews, as sureties therefor and thereunder, and to that end to accept and receive a new contract upon the part of said steamship company, with the said George H. Bradbury and Rufus Hatch as sureties for the performance of the service provided for by said first-named contracts, respectively, and with the like stipulations and conditions:

Now, therefore, these presents witness that the said Pacific Mail Steamship Company, contractors, and the said George H. Bradbury and Rufus Hatch, as sureties, do jointly and severally undertake, covenant, and agree with the United States, and do bind themselves, to transport the mails of the United States between the ports of San Francisco and Hong Kong, in China, touching at Yokohama, Japan, both on the outward and inward passages, to land and receive mails, with a regular connecting branch line of steamers between Yokohama and Shanghai, China, twelve round trips per annum, by an additional monthly line of first-class American steamships, to conform in all respects to the requirements and provisions of the third section of

the act of Congress above cited, approved June 1, 1872, and the advertisement of the Postmaster-General, issued in accordance therewith, dated June 5, 1872, and of sufficient number to perform the required additional monthly service for and during the term of ten
7 years, commencing on the first of October, eighteen hundred and seventy-three. And the said contractors do further covenant and agree with the United States, and do bind themselves, that the steamships hereafter offered for the service shall be of not less than four thousand tons register each, and shall be built of iron, and, with their engines and machinery, shall be wholly of American construction, of the best materials, and after approved models, and shall be so constructed as to be readily adapted to the armed naval service of the United States in case of war; and, before acceptance, the officers by whom they are inspected shall report to the Secretary of the Navy and the Postmaster-General whether this condition has been complied with; and, further, that the said steamships, after acceptance by the Postmaster-General, and during the period they may be employed in conveying the mails, shall be kept up by alterations, repairs, and additions, as the exigency may require, fully equal to the best state of steamship improvement attained; and if not so kept up and maintained, they may be rejected by the Postmaster-General of the United States, as not meeting the requirements of the act of Congress authorizing the additional monthly service, and other satisfactory steamships required in their place. And the said contractors do further covenant and agree, and do bind themselves, to carry the United States mails during the existence of their contracts, without additional charge, on all the steamers they may run upon said line, or any part of it, or any branch or extension thereof; and they do further covenant and agree to transport, free of expense, on each and every steamer, a mail agent of the United States, to take charge of and arrange the mail matter, and to assign to such agent a separate state-room on the upper or main deck, with suitable accommodations for that purpose. And it is further covenanted and agreed by the said contractors, and they do bind themselves:

First. To dispatch an additional steamship from San Francisco on the sixteenth day of each month, and from Hong Kong on the twenty-seventh of each month, or upon such other days as may be hereafter selected, with the approval of the Postmaster-General, the departures to be always so arranged as to alternate at equal and regular intervals with those of the present monthly line during its continuance, and to form in connection therewith a regular semi-monthly mail-service between San Francisco and Hong Kong via Yokohama.

Second. That the time occupied in making each passage between San Francisco and Hong Kong shall not exceed thirty-two days in summer and thirty-five days in winter, including detention at Yokohama, which is not to exceed two days on the outward and three days on the inward voyage; and the time occupied in making each passage on the branch line between Yokohama and Shanghai shall not exceed eight days, including detention at Hiogo and Nagasaki, which is not to exceed twenty-four hours at each port; and, further, to perform the service in conformity with such schedule of days and hours of departures and arrivals as shall be approved by the Postmaster-General of the United States.

Third. To transport the mails in a safe and secure manner, free from wet or other injury, in a separate apartment in each steamship, to be fitted up for the exclusive accommodation of the mail.

Fourth. To take the mail and every part of it from and deliver it and every part of it into the post-office, at San Francisco and Hong-Kong, and the offices of the United States postal agents at Shanghai, (China), Yokohama (Japan), and other Japanese ports of call.

They also undertake, covenant, and agree with the United States, and do bind themselves, to be answerable for the proper care and transportation of the mails, and accountable to the United States for
8 any damages which may be sustained by the United States through the unfaithfulness or want of care of their officers, agents, and employés; and they do further covenant and agree that they will not transmit, by themselves or their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail, and that they will not carry or suffer to be carried, letters or newspapers out of the mail, and they will not knowingly convey any person carrying on the business of transporting letters or other mail-matter, without the special consent of the Post-Office Department of the United States; and, further, that they will convey, without additional charge, post-office blanks, mail-bags, and the occasional special agent on business of the Post-Office Department exclusively, on the exhibition of his credentials.

For which services, when performed, the said Pacific Mail Steamship Company are to be paid by the United States the sum of five hundred thousand dollars per annum (being at the rate of forty-one thousand six hundred and sixty-six dollars for each round voyage), in the currency of the United States, in quarterly payments, on the receipt at the Post-Office Department of satisfactory evidence of the performance of the round voyages embraced in said payments, provided that moneys payable under this contract shall be paid while the said Pacific Mail Steamship Company, or its successors in interest, shall maintain and run the line of steamships for the transportation of freight and passengers at present run between New York and San Francisco, via the Isthmus of Panama, by the said Pacific Mail Steamship Company, and no longer, said payments, however, to be subject to deductions, fines, and penalties imposed by the Postmaster-General for failures and irregularities, as hereinafter stipulated. It is hereby also stipulated and agreed by the said contractors and their sureties that in case of failure from any cause to perform any of the regular monthly voyages stipulated for in this contract, a pro-rata reduction shall be made from the compensation on account of such omitted voyage or voyages. And it is further stipulated and agreed that suitable fines and penalties shall be imposed, in the discretion of the Postmaster-General, for delays and irregularities in the performance of the service. If delays occur in the arrivals of the steamers according to schedule, the company will be fined in a sum not exceeding two thousand dollars for every forty-eight hours; and should delays occur in their departure, a fine will be imposed not exceeding one thousand dollars for every twenty-four hours, except in cases of unforeseen and uncontrollable events; and suitable fines shall also be imposed, unless the delinquency shall be satisfactorily explained to the Postmaster-General in due time, for failure to take or deliver the mail or any part of it; for suffering it to be wet, injured, lost, or destroyed; for carrying it in a place or manner that exposes it to depredation, loss, or injury by being wet or otherwise; and for setting up or running an express to transmit letters or commercial intelligence in advance of the mails; or for transmitting knowingly or after being informed any one engaged in transporting letters or mail-matter in violation of the laws of the United States. And it is hereby further stipulated and agreed that the Postmaster-General shall have the power to

determine this contract at any time in case of its being underlet or assigned to any other party, and that he may annul the contract for repeated failures, for violating the post-office laws of the United States, for disobeying the instructions of the department, or for transporting persons conveying mail-matter out of the mails as aforesaid; and that this contract shall, in all its parts, be subject to and in all respects governed by the requirements and provisions of the third and sixth sections of the act of Congress approved June 1, 1872, entitled
9 "An act making appropriations for the service of the Post-Office Department for the year ending June thirty, eighteen hundred and seventy-three;" and also that the act of Congress approved the 21st of April, 1808, entitled "An act concerning public contracts," so far as the provisions of the act last cited shall apply thereto. And it is hereby further stipulated and agreed that this contract may at any time be terminated by Congress.

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be affixed hereto, and has attested the same by his signature, and the said The Pacific Mail Steamship Company, by George H. Bradbury, president, and their sureties, have hereto set their hands and seals the day and year first hereinbefore written.

JNO. A. J. CRESWELL, [SEAL.]
Postmaster-General.

Signed, sealed, and delivered by the Postmaster-General in presence of—

JOSEPH H. BLACKFAN.

PACIFIC MAIL STEAMSHIP COMPANY, [SEAL.]
By GEO. H. BRADBURY, *President.*
GEO. H. BRADBURY. [SEAL.]

Attest:
W. H. LANE, *Secretary pro tem.*

RUFUS HATCH. [SEAL.]

Witness:
JENNINGS COX.

Signed, sealed, and delivered by the Pacific Mail Steamship Company, by George H. Bradbury, president, and signed by George H. Bradbury and Rufus Hatch, in presence of—
HAMILTON FISH, JR.

POST-OFFICE, NEW YORK, *August*—, 1873.

The undersigned, postmaster at New York, State of New York, certifies under his oath of office that he is acquainted with the above guarantors, and knows them to be men of property and able to make good their guaranty.

T. L. JAMES,
P. M. at New York.

10 II.—*Traverse.*—*Filed December* 11, 1875.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein, and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of five

hundred and thirty-one thousand six hundred and sixty-six dollars and sixty-six cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies
11 the said allegation.

THOMAS SIMONS.
Assistant Attorney-General.

III.—*Amendment to petition.—Allowed in open court.—Filed Apr.* 24, 1878.

The plaintiffs amend their petition by striking out the word "thirty" and the figure "3" in the closing paragraph, and inserting "forty" and "4," so that the amount for which judgment is prayed shall be $541,666.66.

WM. E. CHANDLER,
Plaintiffs' Attorney.

Allowed in open court.

12 IV.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 16th day of October, 1866, the following contract was entered into between the claimant and the defendants:

"This article of contract, made the sixteenth day of October, in the year of our Lord one thousand eight hundred and sixty-six, between the United States of America (acting in this behalf by their Postmaster-General) and the Pacific Mail Steamship Company, with Howard Potter and Francis Skiddy, of New York City, as sureties, witnesseth: That whereas the said Pacific Mail Steamship Company have been accepted, in accordance with the stipulations and provisions of the act of Congress approved February 17, 1865, entitled "An act to authorize the establishment of ocean mail steamship service between the Uinted States and China," and in conformity with the advertisement inviting proposals for said service issued by the Postmaster-General of the United States on the 20th of March, 1865, as contractors to carry the mails of the United States between San Francisco, California, and Hong Kong, in the Chinese Empire, the steamships to touch on each voyage, outward and homeward, at the ports of Honolulu, in the Sandwich Islands, and Kanagawa, in Japan, at the sum of five hundred thousand dollars for the performance of twelve round trips per annum, for a contract term of ten years, to begin on or before the first day of January, eighteen hundred and sixty-seven, and on the day the first steamship of the line shall depart from the port of San Francisco with the mails for China: Now, therefore, the said The Pacific Mail Steamship Company, contractors, and Howard Potter and Francis Skiddy, as sureties, do jointly and severally undertake, covenant, and agree with the United States, and do bind themselves, to transport the mails of the United States between the ports of San Francisco and Hong Kong, in China, touching to land and receive mails at Honolulu, in the Sandwich Islands, and Kanagawa, in Japan, both on the outward and inward passages, twelve round trips per annum, by a monthly line of

first-class American sea-going side-wheel steamships, of from thirty-five hundred to four thousand tons burden each, government measurement, and of sufficient number, not less than four, to perform the required monthly service for and during the term of ten years, commencing on or before the first day of January, eighteen hundred and sixty-seven, and from the day the first steamship of the line shall depart with the mails from San Francisco for the Sandwich Islands, Japan, and China. And the said contractors do further covenant and agree with the United States, and do bind themselves, that the steamships offered for the service shall be constructed of the best materials, and after approved models, with all the modern improvements adapted to sea-going steamships of the first class, and shall, before acceptance by the Postmaster-General, be subject to inspection and survey by an experienced naval constructor, to be detailed for that purpose by the Secretary of the Navy, whose report shall be made to the Postmaster-General; and, further, that the said steamships, after acceptance by the Postmaster-General, and during the period they may be employed in conveying the mails, shall be kept up by alterations, repairs, and additions, as the exigency may require, fully equal to the best state of steamship improvement attained, and if not so kept up and maintained, they may be rejected by the Postmaster-General of the United States as not meeting the requirements of the act of Congress authorizing the establishment of the service, and other satisfactory steamships required in their place. And the said contractors do further covenant and agree to transport, free of expense, on each and every steamer, a mail-agent of the United States, to take charge of and arrange the mail matter, and to assign to such agent a separate stateroom on the upper or main deck, with suitable accommodations for that purpose. And it is further covenanted and agreed by the said contractors, and they do bind themselves:

"First. To despatch a steamship from the port of San Fran-
13 cisco on the first day of each month, and from Hong Kong on the fifteenth day of each month, at such hours as may be fixed hereafter, or upon such other days as may be hereafter selected, with the approval of the Postmaster-General, in order to make connection with the steamships from New York and the English lines from China to Southampton and Marseilles; and also that said steamship shall make an average run of not less than two hundred nautical miles a day while at sea; and that the stoppages at the intermediate ports of Honolulu and Kanagawa shall not exceed the time absolutely necessary to land, and receive the mails, passengers, and cargo, and receive coals; and, further, that after the performance of the second round voyage to Hong-Kong and back, to arrange and adopt a schedule, with the approval of the Postmaster-General, fixing the days and hours of arrival at and departure from the respective terminal and intermediate ports.

"Second. To transport the mails in a safe and secure manner, free from wet or other injury, in a separate apartment in each steamship, to be fitted up for the exclusive accommodation of the mail.

"Third. To take the mail and every part of it from, and deliver it and every part of it into, the post-offices at San Francisco, Honolulu, Kanagawa, and Hong Kong, respectively.

"They also undertake, covenant, and agree with the United States, and do bind themselves, to be answerable for the proper care and transportation of the mails, and accountable to the United States for any damages which may be sustained by the United States through the unfaithfulness or want of care of their officers, agents, and employés;

and they do further covenant and agree that they will not transmit, by themselves or their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail, and that they will not carry or suffer to be carried letters or newspapers out of the mail, and they will not, knowingly, convey any person carrying on the business of transporting letters or other mail-matter, without the special consent of the Post-Office Department of the United States. And, further, that they will convey, without additional charge, post-office blanks, mail-bags, and the occasional special agent on business of the Post-Office Department exclusively, on the exhibition of his credentials. For which services, when performed, the said Pacific Mail Steamship Company are to be paid by the United States the sum of five hundred thousand dollars per annum, in the currency of the United States, in quarterly payments, on the receipt at the Post-Office Department of satisfactory evidence of the performance of the round trips embraced in said payments; subject, however, to deductions, fines, and penalties imposed by the Postmaster-General for failures and irregularities as hereinafter stipulated. It is hereby also stipulated and agreed by the said contractors and their sureties that in case of failure from any cause to perform any of the regular monthly voyages stipulated for in this contract, a pro-rata deduction shall be made from the compensation on account of such omitted voyage or voyages. And it is further stipulated and agreed that suitable fines and penalties shall be imposed, in the discretion of the Postmaster-General, for delays and irregularities in the performance of the service. After the completion of the second voyage to Hong-Kong and back to San Francisco, and the adoption of a schedule of the days and hours of arrival and departure of the steamships, if delays occur in the arrivals of the steamers, the company will be fined in a sum not exceeding two thousand dollars for every forty-eight hours, and should delays occur in their departure a fine will be imposed not exceeding one thousand dollars for every twenty-four hours, except in cases of unforeseen and uncontrollable events; and suitable fines shall also be imposed, unless the delinquency shall be satisfactorily explained to the Postmaster-General in due time, for failing to take or deliver the mail or any part of it; for suffering it to be wet, injured, lost, or destroyed; for carrying it in a place or manner that exposes it to depredation, loss, or injury by being wet or otherwise; and for setting up or running an express to transmit letters or commercial intelligence in advance of the mails; or for transmitting knowingly, or after being informed, any one engaged in transporting letters or mail-matter in violation of the laws of the United States. And it is hereby further agreed that the first steamship of the line shall leave the port of San Francisco with the mails for Japan and China on or before the first day of January, one thousand eight hundred and sixty-seven.

"And it is hereby further stipulated and agreed that the Posmaster-General shall have the power to determine this contract at any time in case of its being underlet or assigned to any other party; and that he may annul the contract for repeated failures, for violating the post-office laws of the United States, for disobeying the instructions of the department, or for transporting persons conveying mail-matter out of the mails as aforesaid; and that this contract shall in all its parts be subject to, and in all respects governed by, the requirements and provisions of the act of Congress approved February 17, 1865, entitled "An act to authorize the establishment of ocean mail-steamship service between the United States and China," and also of the act of Congress

approved the 21st of April, 1808, entitled "An act concerning public contracts," so far as the provisions of the act last cited shall apply thereto.

"In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be affixed hereto, and has
14 attested the same by his signature; and the said The Pacific Mail Steamship Company, by Allan McLane, president, and their sureties, have hereto set their hands and seals the day and year first hereinbefore written.

"ALEX. W. RANDALL. [SEAL.]
"*Postmaster-General.*

"Signed, sealed, and delivered by the Postmaster-General in the presence of—
"JOSEPH H. BLACKFAN.

"THE PACIFIC MAIL STEAMSHIP CO.,
[SEAL.] "By ALLAN McLANE,
"*President.*
"HOWARD POTTER.
"FRANCIS SKIDDY.

"Attest:
"THEO. T. JOHNSON,
"*Secretary.*"

II. Under said contract seven steamships were, from time to time, inspected and accepted for that service, according to the terms of said contract, the names of which were Colorado, Great Republic, China, Japan, America, Alaska, and Constitution. These were more than were necessary for the performance of said service.

III. In the year 1872 the claimant established a second line of steamships from San Francisco to Japan and China and back, leaving the former port about the 16th day of each month. This line was not established under the aforesaid contract, though some of the above-named steamships were engaged in performing this service. The mails of the United States, outward and inward, were sent upon the vessels which composed said second line, from the 16th of May, 1872, till the 20th of September, 1873, and for all the transportation of mails by said vessels during that time the claimant requested and received from the Post-Office Department the sea-postages on said mails, aside from and independent of the subsidy under the contract of 1865, and never made claim for any other compensation therefor.

IV. On the 5th of June, 1872, the Postmaster-General published the following advertisement:

"*Proposals for mail-steamship service between San Francisco, Japan, and China.*

"POST-OFFICE DEPARTMENT,
"*Washington, June 5, 1872.*

"'In accordance with the provisions of sections 3 and 6 of the act of Congress approved June 1, 1872, entitled 'An act making appropriations for the service of the Post-Office Department for the year ending June thirty, eighteen hundred and seventy-three,' which sections are in the words and figures following, viz:

"SEC. 3. * * * And the Postmaster-General is hereby authorized to contract with the lowest bidder, within three months after the passage

of this act, after sixty days' public notice, for a term of ten years from and after the first day of October, eighteen hundred and seventy-three, for the conveyance of an additional monthly mail on the said route, at a compensation not to exceed the rate per voyage now paid under the existing contracts, and upon the same conditions and limitations as prescribed by existing acts of Congress in reference thereto and the respective contracts made in pursuance thereof; and the contractors under the provisions of this section shall be required to carry the United States mails during the existence of their contracts, without additional charge, on all the steamers they may run upon said line, or any part of it, or any branch or extension thereof: Provided, That all steamships hereafter accepted for said service shall be of not less than four thousand tons register each, and shall be built of iron, and with their engines and machinery shall be wholly of American construction and shall be so constructed as to be readily adapted to the armed naval service of the United States in case of war, and before acceptance the officers by whom they are inspected shall report to the Secretary of the Navy and the Postmaster-General whether this condition has been complied with: Provided, That in all cases the officers of the ships employed in the service herein provided for shall be citizens of the United States, and that persons of foreign birth, who have according to law declared their intention to become citizens of the United States, may be employed as though they were citizens within the meaning of this section, or of any act or acts specified in the act of June twenty-eighth, eighteen hundred and sixty-four. And the Government of the United States shall have the right in case of war to take for the use of the United States any of the steamers of said line, and in such case pay a reasonable compensation therefor: Provided The price paid shall in no case exceed the original cost of the vessel so taken; and this provision shall extend to and be applicable to the steamers of the Brazilian line hereafter provided for.'

"'SEC. 6. That if the contract for the increase of the mail-service between San Francisco and China and Japan to a semi-monthly service shall be made with the Pacific Mail Steamship Company, or shall be performed in the said company's ships, or the ships of its successors in interest, the moneys payable under such contract shall be paid while the said company or its successors in interest shall maintain and run the line of steamships for the transportation of freight and passengers, at present run between New York and San Francisco, via the Isthmus of Panama, by the said Pacific Mail Steamship Company, and no longer: Provided, That said requirement shall in all respects apply to any party contracting for the mail-service between San Francisco and China and Japan, as well as to the Pacific Mail Steamship Company'—

"Proposals will be received at the Post-Office Department, in the city of Washington, until 3 o'clock p. m. on Monday the 12th day of August, 1872, for conveying the mails of the United States by means of an additional monthly line of first-class American sea-going steamships, of not less than four thousand tons register, each and of sufficient number to perform twelve round trips per annum between the port of San Francisco and the port of Hong Kong (China), touching at Yokohama (Japan), with a regular branch line, running in connection with the main line, between Yokohama and Shanghai (China), for a contract term of ten years from and after the first day of October, eighteen hundred and seventy-three.

"Each bid should name the time proposed to be occupied in performing the passages each way, including stoppages at intermediate ports,

and also the length of the stoppages at each of the intermediate ports. Schedules of sailing-days, stating the proposed days and hours of departure from each port, as well as the proposed days and hours of arrival, should also accompany each bid. The departures must be so arranged as to alternate at equal and regular intervals with those of the present monthly line during its continuance, forming a regular semi-monthly service in connection therewith; such schedules, however, to be subject to the approval of the Postmaster-General, and to adjustment or alteration by his order, from time to time, as the interests of the postal service may require.

"The steamships offered for the service must be American-built steamships of the first-class, in all respects conforming to the requirements of the laws authorizing the service, and, before acceptance, they will be subject to inspection and survey by an experienced naval constructor, to be detailed for that purpose by the Secretary of the Navy.

"Proposals must conform, in all particulars, to the provisions and requirements of the acts of Congress approved February 17, 1865, and February 18, 1867, and of sections 3 and 6 of the above-cited act of June 1, 1872, and must be properly guaranteed, with satisfactory testimonials, that the bidder or bidders and their guarantors are men of property and abundantly able to make good their tender and guarantee.

"The bidder or bidders must be an American citizen or citizens.

"The bidder's name and residence, and the name of each member of the firm when a partnership offers, should be distinctly stated. If made by a corporation, the bid must be accompanied by a duly authenticated copy of the charter or articles of incorporation and a list of officers and directors.

"All bids exceeding the sum of $5,000 must be accompanied by a certified check or draft, payable to the order of the Postmaster-General upon some solvent national bank, of not less than 5 per centum of amount of one year's pay proposed in such bid or bids, such check or draft to be subject to all the conditions and provisions of existing laws in respect to forfeiture.

"Any assignment or transfer of an ocean mail contract is expressly forbidden by law. Such assignments or transfers are null and void, and the Postmaster-General is required to determine any contract in case of its being underlet or assigned.

"Proposals should be sent under seal to "The Superintendent of Foreign Mails," with the words "Mail proposals, Japan and China route," written on the face of the address; and they should be dispatched in time to be received at this department on or before three o'clock p. m. of Monday the 12th day of August next, which will be the last day for receiving proposals under this advertisement.

"JNO. A. J. CRESWELL,
"*Postmaster-General*."

V. The claimant made the following proposal in answer to said advertisement:

"OFFICE OF THE PACIFIC MAIL STEAMSHIP COMPANY,
"59 & 61 *Wall street, New York, August* 10, 1872.

"To the POSTMASTER-GENERAL, *Washington, D. C.*:

"The Pacific Mail Steamship Company hereby propose to convey the mails of the United States between San Francisco and Hong
16 Kong via Yokohama, with a regular connecting branch line between Yokohama and Shanghai, for ten years from and after the

first day of October, 1873, for the sum of five hundred thousand dollars per annum, being at the rate of forty-one thousand six hundred and sixty-six $\frac{66}{100}$ dollars for each round voyage.

"This bid is made and said service is to be performed in all respects in accordance with the provisions of the (3rd) third and (6th) sixth sections of the post-office appropriation act, approved June 1, 1872, and the advertisement of the Postmaster-General, dated June 5, 1872, copy whereof is hereto annexed and made a part hereof.

"The time to be occupied between San Francisco and Hong Kong will not exceed thirty-two days in summer and thirty-five in winter, including detention at Yokohama, which will not exceed two days on the outward and three days on the inward voyage.

"The time between Yokohama and Shanghai will not exceed eight days, and the detention at Hiogo and Nagasaki will not exceed twenty-four hours at each port.

"The schedule to be arranged as follows:

Leave San Francisco		16th
Arrive at Yokohama	summer..	9th
Arrive at Yokohama	winter..	12th
Leave Yokohama	summer..	11th
Leave Yokohama	winter..	14th
Arrive at Hong Kong	summer..	18th
Arrive at Hong Kong	winter..	21st
Leave Hong Kong		27th
Arrive at Yokohama		5th
Leave Yokohama		8th
Arrive at San Francisco	summer..	29th
Arrive at San Francisco	winter..	2nd

"Each of these dates, except those of departure from San Francisco and Hong Kong, is varied by the number of days in the preceding month, and the length of the voyage will be considerably reduced when the new steamships hereinafter referred to are put in commission.

"We are now building two iron propellors of about 4,500 tons register, capable of steaming 12 knots, and propose, as soon as practicable, with the limited facilities now available in America, to build two more steamers of like construction, but larger and of higher speed, all of which we shall offer for the service in question. Until they can be put into commission, and afterwards, whenever circumstances may require us to relieve them temporarily, we propose to perform the service with one of the steamships heretofore accepted for the China mail service, viz, America, Japan, China, Great Republic, Alaska, and Colorado, or in case of need with the Constitution, heretofore accepted as a spare steamer for said service.

* * * * * * * *

"PACIFIC MAIL STEAMSHIP COMPANY,
"A. B. STOCKWELL, *President.*"

VI. On the 16th of August, 1872, the said proposal of the claimant was accepted by the Postmaster-General, and on the 29th of that month a written contract was entered into between the claimant and the defendants, in pursuance of said proposals and acceptance; but was afterwards, on the 23d of August, 1873, superseded by a new contract, duly executed by the claimant and the Postmaster-General, which is the same described in and annexed to the petition in this case.

VII. On the 24th of October, 1873, the Post-Office Department sent to the claimant the following letter:

"No. 30406.] "POST-OFFICE DEPARTMENT,
"OFFICE OF FOREIGN MAILS,
"*Washington, D. C., October* 24, 1873.

"SIR: I am directed by the Postmaster-General to request that you will furnish him with a full statement in writing of the reasons which have prevented your company from commencing the performance of the additional monthly mail-service between San Francisco and Hong-Kong, via Yokohama, authorized by sections 3 and 6 of the act of Congress approved June 1, 1872; which service, under the provisions of the law and contract, should have been commenced on the 1st of October instant.

"You will also please state what preparations you are making for the commencement of this additional mail-service to Japan and China, and when the company expects to be able to commence said service.

"At your recent interview with the Postmaster-General, at this department, you explained to him verbally the causes which prevented your company from commencing this additional mail-service on the 1st instant, as required by the law and contract, and also stated that
17 the company was making every effort possible to comply with the requirements of the law and contract at the earliest practicable date; but there is nothing on the files of this department furnishing any information on the subject.

"I am, very respectfully, your obedient servant,
"JOSEPH H. BLACKFAN,
"*Superintendent.*

"GEO. H. BRADBURY, Esq.,
"*President of the Pacific Mail Steamship Co., New York City.*"

To this letter the following answer was sent by the claimant:

"OFFICE OF PACIFIC MAIL STEAMSHIP CO.,
"59 & 61 *Wall street, New York, September* 1, 1873.

"SIR: In the matter of the contract between the Postmaster-General and the Pacific Mail Steamship Company for an additional semi-monthly mail-service between San Francisco, Japan, and China, said service to be performed with American-built iron steamships of not less than 4,000 tons register, and to have been commenced October 1, 1873, we beg to submit the following, which will explain the reason of our failure to have placed the ships on the line as per contract.

"Immediately after the passage of the act of Congress providing for a semi-monthly mail-service to China and Japan, in June, 1872, this company entered into a contract for the construction of two (2) iron screw steamers of upward of 4,000 tons register, to class '100 A, Lloyds,' to be fitted with compound engines, guaranteed to make a speed of not less than fourteen and one-half (14½) knots per hour and to be completed in time to commence the service as specified in the act.

"The contractor began work upon these ships as early as it was possible for him to secure so large an amount of material of a weight and size never before used by ship-builders in America, and so rapidly did he accumulate this material that we had reasonable hopes of having the ships in readiness at the appointed time. But, as the work progressed, unthought of obstacles presented themselves, and the skill

of the most skillful was baffled in the attempt to overcome them. First and foremost of the difficulties which beset the contractor was the information received from the proprietors of the rolling-mills that they had no machinery large enough to roll the beams required for these ships. New machinery had to be prepared, and before it was completed and in operation five months of valuable time had been lost. With the finishing of the beams, our contractor took new courage. Then came the strike of the puddlers in the iron-mills, upon whose labor he depended for angles and smaller iron-work. Then came the labor-strike for less time and increased wages, and finally the long and severe winter of 1872–1873, when labor upon material and metals necessary to be done out of doors was seriously retarded, and at times entirely stopped.

"To the foregoing might be added many minor impediments, but equally potent in retarding the work. Against these untoward circumstances the directors and officers of the company have struggled with persistent energy, and since the early spring the work upon the ships has been pushed with renewed vigor, and it is with gratification that we now announce the near completion of the hulls of the two ships. The first will be launched early in December, while the machinery for both is so far advanced as to cause no delay. These ships, when completed and on the route, will class amongst the finest in the world, and indeed it is the testimony of experts of our own and other countries who have examined them that they will be in most respects superior to any other ships afloat, and, when ready for service, they will have cost us nearly two and one-quarter millions of dollars. In addition to these vessels, we had previously contracted for, and have now completed, four iron screw-steamers of about 3,000 tons register, and with a carrying capacity fully equal thereto, all of which are now employed in our Atlantic and Pacific lines.

"Our new iron ship Colima is on her voyage to the Pacific, and is due in San Francisco December 1st, from which port she will take her departure for China December 16th. While it is true that the Colima does not register 4,000 tons, she has a carrying capacity equal to that number, and we hope to have her accepted temporarily upon the China line, until we can place in service the ships now constructing, in pursuance of our contract with the government.

"We regret exceedingly that these ships should not have been ready to commence the service at the specified time, but in view of all the circumstances enumerated, we sincerely hope that you may feel disposed to be lenient with us, thereby enabling us to carry out the requirements of the contract, and thus aiding the only established American line of steamships engaged both in the coasting and foreign trade, and permitting it to became a pride and honor to the great government under whose flag it sails its ships and to whom it looks for protection.

"We have the honor to ask your attention to the fact that we are performing the semi-monthly service with our mail steamers, now accepted as such by the department under our first China mail-contract, and that we propose placing on the route, in addition, our new iron ship Colima (now en route) and the new iron ship Granada, and with these and
18 the mail-steamers now accepted by the department we propose to perform a semi-monthly service until the ships referred to shall take the place of the wooden mail-steamers now on the line; to all of which we ask your kind permission and support, promising an equally faithful and effective compliance with the terms of this, as we

may justly state we have maintained for seven years under those of the first contract.

"We would also beg your attention to the fact that in May, 1872, we put on a semi-monthly line of steamers between San Francisco and China, and that, with three unavoidable exceptions, we have continued it to this time with our regular mail steamers and with others chartered for the purpose at a heavy cost to the company.

"This was done with a view of increasing commercial and mail facilities between the United States, China, Japan, and India, and we have uninterruptedly run, in connection therewith, five steamers per month between the five ports (four in Japan, and Shanghai, in China) comprising our branch line, which we are required to perform but once a month under our contract of January 1, 1867. All this extra and voluntary service has largely increased the receipts of the United States, both in duties and postage, and has facilitated the interests of commerce and travel with those countries and around the world in a marked degree, and these at the cost and as a direct result of the enterprise of this company.

"We would ask your attention most respectfully to the following schedule of departures of steamers, both from San Francisco and Hong Kong, for the remainder of the year 1873, and we will take pleasure in forwarding the table for the year 1874 as soon as the same shall have been prepared:

"From San Francisco.—Alaska, October 1; China, October 16; Colorado, November 1; Japan, November 17; Great Republic, December 1st; Colima, December 16th.

"From Hong-Kong.—Japan, October, 12; Great Republic, October 27; Alaska, November 12; China, November 27; Colorado, December 12; Japan, December 27.

"In conclusion, we beg to submit for your consideration the full facts as presented herein, and we hope that you may find it entirely consistent and within your power to allow us to continue the service as we are now doing until we shall be able to place all our new ships upon the line, when we feel sure you will have no reason to regret that you extended a helping hand to one of America's greatest enterprises in a time of need.

"We have the honor to be, sir, your obedient servant,

"PACIFIC MAIL STEAMSHIP COMPANY,
"By S. K. HOLMAN, *Vice-President.*

"Hon. JNO. A. J. CRESWELL,
"*Postmaster-General, Washington, D. C.*"

VIII. From the date of the said acceptance of claimant's proposals until the month of August, 1874, no iron steamship was offered by the claimant for the service required by the last-named contract. On the 8th of that month the Postmaster-General accepted for that service the steamships City of Peking and City of Tokio, and gave the claimant notice of such acceptance by the following letter:

"No. 32662.] "POST-OFFICE DEPARTMENT,
"*Washington, D. C., August* 8, 1874.

"SIR: I have to inform you that the board of naval officers detailed by the Secretary of the Navy to inspect, at New York, the new iron steamships City of Peking and City of Tokio tendered by your com-

pany, under date of 8th July last, for inspection and acceptance for service in carrying the United States mails between San Francisco and China and Japan, under the contract of August 23, 1873, have reported to me, under date of 7th August instant, that the requirements of the act of June 1, 1872, have been fully complied with in their construction and equipment, the said steamships being of the required tonnage, built of iron, and wholly of American manufacture, and so constructed as to be readily adapted to the armed naval service of the United States in case of war.

"The said steamships City of Peking and City of Tokio are, therefore, accepted for the additional monthly mail-service between San Francisco, Japan, and China, authorized by the act of June 1, 1872, to take effect on their arrival at the port of San Francisco to commence said service; with the distinct understanding, however, that as no appropriation was made by Congress at its last session for the additional monthly service on said route, no payment can be made therefor under the contract with your company until Congress shall have further legislated upon the subject.

"I am, very respectfully, your obedient servant,

"J. W. MARSHALL,
"*Postmaster-General.*

"RUSSELL SAGE, Esq.,
"*President of the Pacific Mail*
"*Steamship Co., New York City.*"

IX. After the 1st day of October, 1873, the claimant continued
19 to dispatch steamers from San Francisco to Japan and China, on or about the middle of each month, in part those which had been accepted by the Post-Office Department for service under the aforesaid contract of February 17, 1865, and in part those which had not been so accepted; and the steamers hereinafter in this finding named left San Francisco on the day named in connection with each, and performed a round voyage out to Japan and China and back to San Francisco, as follows:

China	October	17,	1873.
Japan	November	17,	1873.
Colorado	February	14,	1874.
Alaska	April	18,	1874.
Granada	May	16,	1874.
Japan	June	12,	1874.
Colima	July	14,	1874.
Japan	August	29,	1874.
Vancouver	September	19,	1874.
Vasco de Gama	October	19,	1874.
Vancouver	December	12,	1874.
Vasco de Gama	January	16,	1875.

Of these steamers the Granada, Colima, Vancouver, and Vasco de Gama had never been accepted by the government for service in the transportation of mails.

By all of said steamers mails were taken outward and inward on those voyages, and sea-postages thereon from October 1, 1873, to the 31st of December, 1873, were, on the 11th of February, 1874, paid by the Post-Office Department to the claimant, amounting to $1,510.81.

Afterwards, for like service up to September 17, 1874, the Post-Office

Department recognized the right of the claimant to the sum of $5,195.61 for sea-postages to that date; and for like service up to December 31, 1874, the said department recognized the right of the claimant to the sum of $2,904.23 for sea-postages to that date; and for each of those sums a warrant and draft was issued by said department in favor of the claimant; but the claimant, on the 6th of April, 1875, declined to accept the same as compensation for mail transportation, and announced its intention to insist on its full rights under the aforesaid contracts of August 29, 1872, and August 23, 1873.

X. On the 20th of February, 1875, the said steamship City of Peking left San Francisco on her first voyage to Japan and China, and she arrived at Yokohama on the 13th of March, and at Hong-Kong on the 25th of March; and on her return arrived at Yokohama on the 7th of April, and at San Francisco on the 28th of April, 1875. On the said voyage, out and back, the City of Peking carried the United States mails under the contract sued on.

CONCLUSION OF LAW.

Upon the foregoing facts, and the additional facts found on the request of the defendants, the majority of the court find as a conclusion of law that the claimant is entitled to recover for the voyage of the steamship City of Peking stated in Finding X the sum of $41,666.66; and is not entitled to recover any more of the claims sued on. For that sum the claimant should have judgment.

20 V.—*Request of claimant for an additional finding of fact and ruling thereon.*

The claimants request the court to find that the City of Peking, on her voyage commencing February 20, 1875, carried the United States mails under the contract of August 23d, 1873.

By their attorney:

WM. E. CHANDLER.

On the foregoing request the court makes the following ruling, to wit: Allowed and added to Finding X.

VI.—*Request of defendants for additional findings of fact and rulings thereon.*

The defendants respectfully request the court to find the following additional facts:

I. That the claimant commenced the service provided for in the contract of the 16th day of October, 1866, by dispatching the steamer
21 Colorado with the mails, from San Francisco to China, on the 1st day of January, 1867.

II. That on the 20th day of March, 1867, a further contract for mail service was entered into by and between the claimant and defendants, which contract was as follows:

"This article of contract, made the twentieth day of March, in the year of our Lord one thousand eight hundred and sixty-seven, between the United States of America (acting in this behalf by their Postmaster-General) and the Pacific Mail Steamship Company, with Howard Potter and Francis Skiddy, of New York City, as sureties, witnesseth:

"That whereas the contract executed by the said Pacific Mail Steam-

ship Company, on the sixteenth day of October, A. D. one thousand eight hundred and sixty-six, for the performance of the ocean
22 mail steamship service between the United States, Japan, and China, authorized by act of Congress approved February seventeen, eighteen hundred and sixty-five, provides that the steamships of said company shall touch on each voyage, outward and homeward, at the port of Honolulu, in the Sandwich Islands, as required by the aforesaid act; and whereas the second section of the act of Congress entitled 'An act making appropriations for the service of the Post-Office Department during the fiscal year ending June thirtieth, eighteen hundred and sixty-eight, and for other purposes,' approved February eighteenth, eighteen hundred and sixty-seven, provides as follows, to wit: 'That so much of the act of Congress approved February seventeenth, eighteen hundred and sixty-five, authorizing said service, as requires the said steamships to touch at Honolulu, in the Sandwich Islands,
23 shall be, and the same is hereby, repealed, upon the express condition, however, that the contractors for said steamship service shall enter into contract, to the satisfaction of the Postmaster-General, agreeing to establish, within five months from the passage of this act, in lieu of said service released, a branch line of steamship service, carrying the United States mails, between the port in Japan used by the main line of steamships and the port of Shanghai, in China, making continuous regular trips, connecting with the main line both on the outward and homeward voyages, under the direction of the Postmaster-General, which service shall be performed by first-class American sea-going steamships, and without additional charge to the United States;' and whereas the said Pacific Mail Steamship Company have accepted the terms and provisions of the said act:

"Now, therefore, the said The Pacific Mail Steamship Company,
24 contractors, and Howard Potter and Francis Skiddy, as sureties, in consideration of the release granted by said act of Congress from touching with their steamships to land and receive mails at Honolulu, in the Sandwich Islands, on both outward and inward passages between the United States, Japan, and China, do jointly and severally undertake, covenant, and agree with the United States, and do bind themselves, to establish, in lieu of said service released, a branch line of first-class American sea-going steamships, carrying the United States mails, without additional charge, between Yokohama (Kanagawa) or other port in Japan used by the main line of steamships plying between San Francisco and Hong Kong and the port of Shanghai, in China, making continuous regular monthly trips between said ports, in connection with the main line, both on the outward and homeward voyages, according to the terms and conditions of the aforesaid act approved February eighteenth, one thousand eight hundred and sixty-seven.

25 "And they do further stipulate and agree to commence this branch service from Yokohama to Shanghai and back in connection with the steamship leaving San Francisco on third July, eighteen hundred and sixty-seven, for Yokohama and Hong Kong, and her return, and to maintain the same during the continuance of their contract.

"And it is further covenanted and agreed between the parties hereto that the stipulations and provisions of the original contract executed with said company on the sixteenth day of October, A. D. one thousand eight hundred and sixty-six, so far as they are applicable, shall also apply to the service to be performed on the branch line between Yoko-

hama or other port in Japan used by the main line and the port of Shanghai, in China.

"In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be affixed hereto, and has
26 attested the same by his signature; and the said The Pacific Mail Steamship Company, by Allen McLane, president, and their sureties, have *hiither*to set their hands and seals the day and year first hereinbefore written.

[SEAL.] "ALEX. W. RANDALL,
"*Postmaster-General.*

"Signed, sealed, and delivered by the Postmaster-General, in presence of—

"JOSEPH H. BLACKFAN.

"PACIFIC MAIL STEAMSHIP COMPANY,
"By ALLAN McLANE, *President.* [SEAL.]
"HOWARD POTTER. [SEAL.]
"FRANCIS SKIDDY. [SEAL.]

"Attest:
"THEODORE T. JOHNSON, *Secretary.*

"Signed, sealed, and delivered by Pacific Mail Steamship Company and Howard Potter and Francis Skiddy in presence of—
"RICHARD B. IRWIN."

27 III. From the date of the acceptance of claimant's proposals until the month of August, 1874, no steamship of 4,000 tons was offered by the claimant for the service required by the contract entered into between the parties on the 29th of August, 1872, and afterwards superseded by the contract of the 23d of August, 1873, the same as described and annexed to the petition in this case. On the 8th of that month the Postmaster-General accepted for that service the steamship City of Peking and City of Tokio, and gave the the claimant notice of such acceptance by the following letter:

"No. 32662.] "POST-OFFICE DEPARTMENT,
"*Washington, D. C., August* 8, 1874.

"SIR: I have to inform you that the board of naval officers detailed by the Secretary of the Navy to inspect at New York the new iron steamships City of Peking and City of Tokio, tendered by your
28 company, under date of 8th July last, for inspection and acceptance for service in carrying the United States mails between San Francisco and China and Japan, under the contract of August 23, 1873, have reported to me, under date of 7th August instant, that the requirements of the act of June 1, 1872, have been fully complied with in their construction and equipment, the said steamships being of the required tonnage, built of iron, and wholly of American manufacture, and so constructed as to be readily adapted to the armed naval service of the United States in case of war.

"The said steamships City of Peking and City of Tokio are, therefore, accepted for the additional monthly mail service between San Francisco, Japan, and China authorized by the act of June 1, 1872, to take effect on their arrival at the port of San Francisco; to commence said service with the distinct understanding, however, that as no appropriation was made by Congress at its last session for the ad-
29 ditional monthly service on said route, no payment can be made

therefor under the contract with your company until Congress shall have further legislated upon the subject.

I am, very respectfully, your obedient servant,

"J. W. MARSHALL,
"*Postmaster-General.*

"RUSSELL SAGE, Esq.,
"*President of the Pacific Mail Steamship Co., New York City.*"

IV. That the said sea postages, amounting to $1,510.81, paid by the Post-Office Department to the claimant on the 11th of February, 1874, for the carrying of the mails from San Francisco to China, from and inclusive of October 1st, 1873, to and inclusive of December 31st, 1873, as mentioned in Finding IX, page 8 of the findings, were paid at the request of the claimant.

V. That after the sailing of the City of Pekin from San Francisco to China, on the 20th of February, 1875, as stated in Finding X,
30 page 8 of the findings, the claimant continued to transport the mails in the same ship, and over the same route, between the same ports, and at the same time (about the middle of the month), as it had from the 1st of October, 1873, down to and including the 16th day of January, 1875, as set forth in Finding IX, page 8 of the findings. And this subsequent transportation of the mails between San Francisco and China in no way differed from the transportation of them by it previously, to wit, from October 1st, 1873, down to and inclusive of the 16th of January, 1875, as set forth in Finding IX, page 8 of the findings. Nor yet differing from the transportation of them by it from May 16th down to and inclusive of the 20th of September, 1873, as set forth in Finding III, page 3 of the findings.

THOMAS SIMONS.
Assistant Attorney-General.

Upon the foregoing requests, the court makes the following ruling, to wit:

Of the foregoing requests, the first, second, and fourth are allowed; the third is refused, because it is a mere repetition of the court's Finding VIII; and the fifth is refused, because not sustained by the evidence.

31 (NOTE BY THE CLERK.—The court filed no opinion in this case.)

VII.—*Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 11th day of June, A. D. 1878, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said the Pacific Mail Steamship Company do have and recover of and from the United States the sum of forty-one thousand and six hundred and sixty-six dollars and sixty-six cents (41,666.66).

VIII.—*Application of claimant for and the allowance of an appeal.*

PACIFIC MAIL STEAMSHIP COMPANY
vs.
THE UNITED STATES. } No. 10705.

32 From the judgment rendered in the above-entitled cause, on the 11th day of June, 1878, in favor of the claimants, the claimants, by their attorney, on the 5th day of September, 1878, make application for and give notice of an appeal to the Supreme Court of the United States.

WM. E. CHANDLER,
Attorney for Claimants.

Filed September 5, 1878.

AT CHAMBERS, *Sept.* 5, 1878.

Allowed.

C. D. DRAKE,
Chief Justice.

IV.—*Application of defendants for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause on June 11, 1878, in favor of claimant, the defendants, by their Attorney-General, on the 7th day of September, 1878, make application for and give
33 notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed September 7, 1878.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

34 *Certificate of record on appeal.*

THE PACIFIC MAIL STEAMSHIP COMPANY
versus
THE UNITED STATES. } No. 10705.

It appears of record that on the eleventh day of September, A. D. 1878, the foregoing record on appeal was certified up by me to the Supreme Court of the United States.

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

35 XII.—*Mandate of the Supreme Court reversing judgment and directing further proceedings.—Filed Mar.* 28, 1881.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Court Claims, greeting:

Whereas lately in the Court of Claims, before you, or some of you, in

a cause between the Pacific Mail Steamship Company, claimant, and the United States, defendant, wherein the judgment of the said Court of Claims entered in said cause on the 11th day of June, A. D. 1878, is in the following words, viz: "The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said the Pacific Mail Steamship Company do have and recover of and from the United States the sum of forty-one thousand and six hundred and sixty-six dollars and sixty-six cents ($41,666.66)," as by
36 the inspection of the transcript of the record of the said Court of Claims, which was brought into the Supreme Court of the United States by virtue of an appeal taken by the Pacific Mail Steamship Company and a cross appeal taken by the United States, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty, the said cause came on to be heard before the said Supreme Court, on the said transcript of record on appeal and cross-appeal, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Claims with instructions to render a judgment in conformity with the opinion of this court.

28th February, 1881.

37 You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion & judgment of this court, as according to right and justice, and the laws of the United States ought to be had, the said appeals notwithstanding.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the twenty-third day of March, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

38 XII.—*Additional finding of facts.—Filed May* 31, 1881.

In accordance with the mandate of the Supreme Court, the Court of Claims has inquired into deductions for non-performance of duty or other matters provided in the contract set forth in the claimant's petition, in regard to which no finding has been made by this court, and now find the facts relating thereto to be as set forth in the following agreed statem'nt of facts, and the communication from the Postmaster-General annexed thereto and referred to therein:

"*Agreed statement of facts.*

"Court of Claims, December term, 1880.

"THE PACIFIC MAIL STEAMSHIP CO.
"*vs.*
"THE UNITED STATES. } No. 10705.

"It is agreed that the above case be submitted, under the mandate and opinion of the Supreme Court herein, on the following facts, which

so far as they may affect or modify any facts heretofore found by the court are agreed to be in addition to or in substitution therefor:

"Steamships which had been accepted under the first contract for the transportation of the mails made trips outward from San Francisco carrying United States mails as follows:

"The China	left	San Francisco	October 16, 1873.
"The Japan	"	"	"	November 17, 1873.
"The Colorado	"	"	"	February 14, 1874.
"The Alaska	"	"	"	April 18, 1874.
"The Japan	"	"	"	June 13, 1874.
"The Japan	"	"	"	August 29, 1874.

"That all of said voyages or trips were made to Hong Kong via Yokohama and return to San Francisco except that of the Japan, which left San Francisco August 29, 1874. On that trip the Japan sailed only to Yokohama, arriving there September 23d, and sailing thence on September 28th for, and arriving at, San Francisco on October 21st, 1874.

"The mails carried outward by the Japan on this trip were taken from Yokohama to Hong Kong by the steamship Nevada, which sailed from Yokohama September 24th and arrived at Hong Kong October 1st, 1874, and the Japan, on her return from Yokohama, brought the mails which had been forwarded from Hong Kong by the steamship Costa Rica on the 19th of September, 1874.

"The steamships Nevada and Costa Rica were extra steamers of the plaintiff which had not been accepted by the Post-Office Department under either contract.

"The trip of the steamship Japan, which began from San Francisco August 29th, 1874, succeeded a trip made by the steamship Colorado, which left San Francisco on August 13th, and by agreement was credited by the Post-Office Department to the first contract as in completion of the trip of the Alaska, which left San Francisco July 25th, 1874, and in consequence of an accident at Hong Kong was unable to complete her trip, and her mails were brought by the Colorado.

"The Postmaster-General has entered an order herein in the terms set forth in the annexed communication.

39 "The claimant has been paid as sea-postages five hundred and forty-nine $\frac{36}{100}$ dollars for transportation of mails by the China on the trip of October 17th, 1874, and the Japan of November 17th, 1874, before mentioned.

"J. F. FARNSWORTH,
"*Attorney for Plaintiff.*
"THOMAS SIMON,
"*Asst. Att'y-General.*"

After the case was submitted the following letter was received from the Postmaster-General:

"POST-OFFICE DEPARTMENT,
"*Washington, D. C., May* 17, 1881.

"To the honorable the justices of the Court of Claims:

"I hereby respectfully inform the justices of the Court of Claims that I have this day made the following order concerning the matter pending, on mandate of the Supreme Court, in the Court of Claims in the suit of the Pacific Mail Steamship Company for compensation for postal service between San Francisco and Hong Kong, China, via Yokohama,

Japan, under contract with this department of the 23d August, 1873, viz:

"In case the Court of Claims, in rendering a judgment in conformity with the opinion of the Supreme Court of the United States in the matter of the claim of the Pacific Mail Steamship Company vs. The United States, on cross-appeals from the judgment of the Court of Claims (Nos. 201 and 202, October term, 1880), shall hold that the trip to Yokohama and return, which was commenced at San Francisco, by the steamship Japan, on 29th August, 1874, is to be accepted as having been performed under the contract of 23d August, 1873, for the additional monthly service between San Francisco and Hong Kong via Yokohama, it is ordered that a fine of thirteen thousand dollars ($13,000), being at the rate of one thousand dollars for every twenty-four hours' delay in the departure of said steamship from San Francisco (which occurred 13 days after the sailing day fixed by said contract), be imposed on account of said delay; and the Court of Claims advised thereof for such action as shall be deemed proper by the said court.

"THOMAS L. JAMES,
"*Postmaster-General.*"

CONCLUSION OF LAW.

On the foregoing facts the court decides as conclusion of law in regard to the trip which began with the sailing of the steamer Japan from San Francisco on the 29th day of August, A. D. 1874, that the claimants are entitled to recover for the same the sum of $41,666.66 as a trip performed in an accepted vessel under the contract, without any deduction therefrom by reason of the alleged fine imposed by the Postmaster-General; and that the defendants should be allowed the sum of $549.36 in making up the judgment in this suit, the claimants having already received that sum for sea-postages from mail matter carried under the contract in suit.

XIII.—*Opinion.*

DAVIS, J., delivered the opinion of the court:

This suit is brought to recover for mail service performed in thirteen round trips between the United States and China. The contract price per trip was $41,666.66.

At the trial in the December term, 1877, the court found that six trips were performed in wooden vessels which had been accepted by the United States under a former contract, six trips in wooden vessels which had not been so accepted, and one in an iron vessel accepted under the contract sued on. The court held that the claimants could not recover for any of the trips in the wooden vessels, but gave judgment for the one performed in the City of Peking, the iron vessel.

The case was taken to the Supreme Court on appeal. Our judgment was in part reversed there, and we are now called upon to execute their mandate.

40 The mandate directs proceedings to be had "in conformity with the opinion and judgment" of the appellate court. That opinion says: "As regards the sum allowed claimant for the voyage of the City of Peking we think the Court of Claims was clearly right." That is, therefore, no longer in dispute.

The opinion also says: "The Court of Claims finds that the additional mail service was performed by twelve round trips, beginning October

17, 1873, and terminating January 16, 1875, and that of these voyages six were made by ships which had been accepted under the first contract, and six by vessels which had never been accepted by the Postmaster-General. We are of opinion that claimant can only recover on this contract for the service rendered by vessels which had been accepted under the contract." The service rendered in the six trips by unaccepted vessels is therefore likewise no longer in dispute.

The government concedes that the mandate entitles the company to recover for five trips in the accepted vessels. This leaves in dispute only the trip of the Japan, which left San Francisco August 29, 1874.

The opinion of the Supreme Court clearly recognizes this trip as one of those which are to be paid for; but it adds: "There may be deductions for non performance of duty, or other matters provided in the contract, in regard to which no finding is made by the Court of Claims, but which will be open to inquiry on the return of the case to that court. Our power of action in the premises is thus limited to deductions from the contract price of the trip by reason of, first, non-performance of duty; and, second, other matters not provided in the contract. On both these points we may make further inquiries, except so far as precluded by facts already found. The parties have made an agreed statement on these points, which we have incorporated in our findings as a fact.

This statement shows that there was a delay of thirteen days in the time of starting the trip. It also shows that the Japan made only a portion of the round trip. She went only to Yokohama. The mails for that trip between that port and Hong Kong, both ways, were carried by unaccepted vessels. The defendants contend that each of these facts amounts to a substantial variation from the contract, and takes the trip out of its operation.

The former findings showed the day of the starting of the Japan on the disputed trip. The mandate leaves us no power to make a deduction for non-performance of duty or other matter in the contract, in regard to which a finding had been already made.

The second objection raises a more difficult question. The contract was to carry the mails between San Francisco and Hong Kong, touching at Japan with mails. As interpreted by the Supreme Court, it was a contract to carry them in part in seven side-wheel steamships which had already been constructed by the company, and inspected and accepted by the government. The disputed carriage was made to and from Japan in one of the accepted vessels. For some unexplained reason it was made between Japan and Hong Kong in unaccepted vessels. If we assume that there was no good reason for the failure, and that the substitution of the unaccepted vessels was an arbitrary act, it follows that the company was in fault, and cannot recover for the trip.

On the other hand, it is plain that the government got in substance all it bargained for, except in the matter of the time of starting, which we have already disposed of. The company carried the mails to Hong Kong in a safe and secure manner, and employed in doing it one of the specially constructed vessels. If it was the object of the government in contracting for a particular kind of vessel to secure the safe
41 transportation of the mails, that object was accomplished. If it had in view the construction of vessels of that kind in the mercantile marine, that end also was gained. We are not prepared to say that no circumstances could arise which would relieve the claimants

from performing the whole trip in accepted vessels, or which would warrant the Postmaster-General in accepting a part performance in an accepted vessel as a whole peformance, or which would require the court to so regard it.

It is plain from all the facts that the voyage was and still is treated at the Post-Office Department as performed in an accepted vessel. They show no equitable reason for stretching the authority conferred upon us by the mandate. The Supreme Court, as we have already pointed out, authorizes us to make further inquiries as to matters "in regard to which no finding was made," and further says that "the Court of Claims finds that * * * of these voyages, six were made by ships which had been accepted." Under the circumstances we hold ourselves bound by the literal language of the appellate court.

On the 17th day of May, 1881, the Postmaster-General ordered that in case judgment should be rendered in favor of the claimants for the disputed trip, a fine of $13,000 for thirteen days delay in starting be imposed upon the claimants. The Attorney-General contends that if we find for the claimant as to this voyage the amount of the fine should be considered in making up the judgment.

This cannot be done, for two reasons: 1st. The reason already given that the mandate leaves no power to make a deduction for non-performance of duty or other matter in the contract, in regard to which a finding of fact has already been made. 2d. The order on its face purports to have no effect until our judgment is entered, and therefore cannot be considered in making it up. It may be a proper matter for consideration at the Treasury when the judgment is presented for payment, but cannot be entertained here. If it has any force in this court it can only operate as an estoppel to prevent the government from setting up that the voyage was not performed under the contract.

Judgment.

The judgment of the court is that the claimants do have and recover of the United States the contract price for seven round trips, as follows: For the trips commencing October 16, 1873, November 17, 1873, February 14, 1874, April 18, 1874, June 13, 1874, August 29, 1874, and February 20, 1875, less the sum of $549.36, already received by the claimants, being the sum of two hundred and ninety-one thousand one hundred and seventeen dollars and thirty cents ($291,117.30).

42 XIV.—*Judgment.—Entered May* 31, 1881.

At a Court of Claims, held in the city of Washington, on the 31st day of May, A. D. 1881, in compliance with the mandate of the Supreme Court, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said The Pacific Mail Steamship Company do have and recover of and from the United States the contract price for seven round trips, as follows. For the trips commencing Oct. 16th, 1873, November 17th, 1873, February 14th, 1874, April 18th, 1874, June 13th, 1874, August 29th, 1874, and February 20th, 1875, less the sum of $549.36 already received by the claimants, being the sum of two hundred and ninety-one thousand one hundred seventeen dollars and thirty cents ($291,117.30).

43 XV.—*Application of defendants for and allowance of appeal.—Filed August* 24, 1881.

From the judgment rendered in the above-entitled cause on May 31, 1881, in favor of claimant, the defendants, by their Attorney-General, on the 24th day of August, 1881, make application for and give notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Ass't Attorney-General,
A. D. R.

Allowed.

C. D. DRAKE,
Chief Justice.

44 In the Court of Claims.

THE PACIFIC MAIL STEAMSHIP COMPANY
versus
THE UNITED STATES. } No. 10705.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the record on appeal to the Supreme Court of the United States in the cause aforesaid as certified upon the eleventh day of September, A. D. 1878, of the mandate of said Supreme Court filed in the Court of Claims on the 28th day of March, A. D. 1881, and of the proceedings thereon, to wit, of the additional finding of facts and conclusion of law thereon, filed by the court May 31, 1881, of the opinion of the court, of the final judgment of the court, of the application of the defendants for appeal to the Supreme Court of the United States, and allowance of same by Chief Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 14th day of October, 1881.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) No. 1070. The United States, appellant, vs. The Pacific Mail Steamship Company. Court of Claims. Filed October 15, 1881.

REC 1070—4

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES, APPELLANTS,
v.
THE PACIFIC MAIL STEAMSHIP COMPANY. } No. 1070.

APPEAL FROM THE COURT OF CLAIMS.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES, APPELLANT,
v.
THE PACIFIC MAIL STEAMSHIP COMPANY. } No. 1070.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR UNITED STATES UNDER RULE XX.

In 1866 the claimants contracted with the United States to carry the mails between San Francisco and Hong-Kong by a regular monthly line of steamers. By a second contract, made in 1873, they agreed to dispatch twelve additional steamships per year, the departures to be so arranged as alternate at equal intervals with those under the first contract. Until the termination of both contracts, in 1875, mails were transported semi-monthly with more or less regularity. At the former hearing of the case the controversy was whether vessels which had been accepted by the Postmaster-

General under the first contract were available for performance of the second. This court sustained claimants' position, reversed the decision of the court below, and remanded the case for further proceedings in accordance with the opinion and judgment of the appellate court (103 U. S., 721). The case was then tried upon a statement of facts which, so far as they might affect or modify any facts theretofore found, were agreed by counsel to be in addition to or in substitution therefor. The court below found the additional facts as agreed upon and entered judgment for $291,117.30.

ASSIGNMENT OF ERRORS.

I. The court below erred in not deducting from the amount allowed, $41,666.66, on account of the trip of the Japan, which commenced at San Francisco, August 29, 1874.

II. If the court below committed no error in allowing payment for the trip of the Japan, it erred in not deducting $13,000 from the allowance, on account of the fine imposed by the Postmaster-General for thirteen days' delay in said trip.

BRIEF.

There is nothing in dispute except this trip by the Japan, and in submitting the case it is understood by both parties that the question to be determined is not whether the terms of the mandate precluded the court below from making either deduction, but that the case is to be heard on the merits.

The Japan sailed from San Francisco August 29, 1874; remained at Yokohama five days, and for no explained reason sailed for San Francisco instead of Hong-Kong. The mails taken out were carried from Yokohama, and the mails carried home by the Japan had been brought to Yokohama, on unaccepted vessels (record, folio 38).

The contract requires that twelve round trips per annum shall be performed by a line of first-class American steamships, to conform in all respects to the requirements and provisions of the act of 1872 and the advertisement of the Postmaster-General (fol. 6).

We submit that the transportation of the mails between Yokohama and Hong-Kong by unaccepted vessels is sufficient of itself to warrant the deduction of $41,666. That the Japan performed about three-fourths of the voyage puts the case in no better position than if she had performed but one-fourth. If a trip from San Francisco to Yokohama and return is a round trip between San Francisco and Hong-Kong, by a parity of reasoning a

voyage between Yokohama and Hong-Kong would be equally so.

It may be that the Costa Rica and Nevada carried the mails as safely as the Japan would have done, but the six unaccepted vessels heretofore excluded by this court did so as well.

This claim is not based upon a *quantum meruit*, but upon an *entire* contract giving claimant ten to fifteen times as much as other vessels would expect for like service. The consideration for this increase of compensation was that first-class American steamships should be used and that they should depart regularly. The contract expressly makes a severance of the voyages by permitting a deduction of one-twelfth of the compensation for each omitted voyage, but it leaves each voyage complete and entire. We may not deduct one-fourth of $41,666, but must pay the whole sum or nothing; and if a voyage, one-fourth of which was performed in unaccepted vessels, may be considered as subtantial compliance, there is no point at which the concession must stop. "The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done." The Harriman, 9 Wall. p. 472.

The failure of the Japan to make a complete voyage does not appear to have been the result of ~~this~~ unavoidable accident, or to have been with the assent of the Post-Office Department. As stated by this Court (103 U. S., p. 725), the company, during the existence of the first contract, had, in pursuit of their general business as carriers, been making trips in excess of the demands of that contract, and for mails so carried had received sea-postage. The date of the Japan's depart-

ure, together with her return from Yokohama, indicate strongly that the voyage in question was merely for commercial purposes, and not with reference to either contract. But, whether so or not, the contract requires "twelve *round trips* per annum" (fol. 6), and the compensation was "$41,666 for each *round voyage*" (fol. 8). Even if the Costa Rica and Nevada had been accepted vessels, this method of breaking the voyage and bringing home mails that left Hong-Kong before the arrival of the Japan at Yokohama was not what was contemplated by the contract. Conceding, for the moment, that the *departure* on the 29th of August was within the second contract, the *arrival* at Hong-Kong was fixed by the contract at not later than thirty-two days thereafter, or about the 30th of September. The return voyage should have commenced on the 15th or 27th of October. But the mails brought home left Hong-Kong as early as the 19th of September. Now, if claimants complied with their first contract (fol. 13), a vessel had left Hong-Kong just four days before for a voyage to San Francisco.

By the contract of 1866 the claimants agreed to dispatch a steamship from San Francisco on the 1st of each month, and from Hong-Kong on the 15th of each month (fol. 13); by the contract of 1872 they agreed to dispatch an additional steamship from San Francisco on the 16th of each month, and from Hong-Kong on the 27th of each month, the departures to be always so arranged as to alternate at equal and regular intervals with those of the present monthly line, and to form, in connection therewith, a regular semi-monthly mail-service between San Francisco and Hong-Kong *via* Yoko-

hama (fol. 7). The mail taken by the Japan left S
Francisco on the 29th of August (fol. 38), just th
days before the company was bound to dispatch a stea
ship under the first contract.

It is fair to assume, in the absence of evidence to
contrary, that the claimants complied with a contr
which had been in operation eight years, and for wh
they had an abundant supply of vessels, by sendin
steamer on September first. It is found as a fact t
a vessel did sail on the 13th August.

[Mem. The paragraph upon page 25 of the reco
which begins with the words, "The trip of the stea
ship Japan," &c., seems at first sight ambigous upon
point whether it was that trip or "the trip made by
steamship Colorado" which was *credited* "in comp
tion of the trip of the Alaska." From the last line
the paragraph, however, it will be seen that it is a t
of the *Colorado* that is alluded to.

This is said to obviate any appearence of contrad
tion betwixt this and the other parts of the reco
which show that the trip of the Japan there mention
is that now in question.]

The Alaska left San Francisco July 25, under the fi
contract, and proceeded to Hong-Kong, where, by r
son of an accident she became disabled. As a voya
from San Francisco to Hong-Kong consumes more th
twenty days, the Colorado could not have left S
Francisco on the 13th August *for the purpose* of co
pleting the trip of the Alaska; and the fact (though
so found in the record) is that the Colorado left Aug
13, *with intent to comply with the second contract.*

The attitude of the Post-Office Department at t

time was that payments could not be made under the second contract except for iron vessels, and while refusing to pay the Colorado for the trip of August 13th under the second contract, it consented, inasmuch as she brought home the mails that would have been carried by the Alaska, to substitute her voyage for the incomplete one of the Alaska, and her trip "by agreement was credited by the Post-Office Department as in completion of the trip of the Alaska." It does not appear whether the outward trip of the Alaska has been paid for; but as no claim is made therefor, the question of compensation for half a voyage is of no importance. The fact remains, however, that the trip of the Colorado of August 13, 1874, has been paid for; and it may be assumed that a vessel was dispatched on or about the 1st of September, and that such trip was paid for. The trip, therefore, of the Japan was over and beyond the requirements of the two contracts, and the claimant is entitled only to sea-postage therefor. (§4009 R. S.)

It is respectfully submitted that this voyage from San Francisco to Yokohama and return, eked out by the use of unaccepted vessels and interjected between the regular departures fixed by both contracts, cannot be set up by claimants as a regular monthly voyage.

II.

After the case was submitted below, but before judgment, the Postmaster-General made and communicated to the court an order which, upon supposition that the court should adjudge the trip in question to be in compliance with the contract, assessed a fine of $13,000 for *delay* (fol. 39). Grave doubts may be occasioned by the contingent nature of the order, and probably the

better view is that in case this court shall affirm the judgment below as to the trip of the Japan, a new and absolute order should be made. An absolute order previous to a decision would have been a recognition of the trip.

S. F. PHILLIPS,
Solicitor-General.
JOHN S. BLAIR,
For the United States.

Supreme Court of the United States.

October Term, 1881.

THE UNITED STATES, APPELLANT, *vs.* THE PACIFIC MAIL STEAMSHIP COMPANY, APPELLEE.	No. 1070.

Appeal from the Court of Claims.

Brief for Appellee under Rule 20.

This case was heard in this court at the last term thereof, upon cross-appeals from the Court of Claims. (103 U. S., 721.)

In rendering judgment in the case this court said:

"The Court of Claims finds that the additional mail service was performed by twelve round trips, beginning October 17, 1873, and terminating January 16, 1875, and that of these voyages six were made by ships which had been accepted under the first contract, and six by vessels which had never been accepted by the Postmaster-General. We are of opinion that claimant can only recover on this contract for the service rendered by vessels which had been

" accepted, and that it cannot recover on the contract for " mails carried in vessels which had not been accepted un- " der the contract. As to these, the sea postages offered by " the Postmaster-General must be, as it was before the mak- " ing of the contract, the only compensation. There may " be deductions for non-performance of duty, or other mat- " ters provided in the contract, in regard to which no find- " ing is made by the Court of Claims, but which will be " open to inquiry on the return of the case to that court.

" As regards the sum allowed claimant for the voyage of " the *City of Pekin*, we think the Court of Claims was clearly " right. That vessel had been examined and accepted by " the Postmaster-General as one of the new and higher class " of vessels, and the mails had been delivered to her at San " Francisco on the 20th of February, 1875, and she had " started on the round trip ten or twelve days before Con- " gress passed the statute annulling the contract, and she " carried the mails under that contract on the voyage out and " the return voyage. We are of opinion that the repeal of " the statute and the annulment of the contract were not de- " signed to operate on that voyage, and that in that respect " the judgment of the Court of Claims was right.

" Its judgment in regard to the other trips is reversed, and " the case is remanded to it, with instructions to render a " judgment in conformity to this opinion."

The Court of Claims executed the mandate of this court by giving judgment in favor of the claimant company for the seven trips or voyages of the accepted steamers, including the voyage of the *City of Pekin*, and deducting the sea postages which had been received on account of any of those voyages.

The Court of Claims made the following " additional " findings of facts," and " conclusions of law :"

" FINDING OF FACTS.

* * * * * * *

" It is agreed that the above case be submitted under the

" mandate and opinion of the Supreme Court herein on the " following facts, which, so far as they may affect or modify " any facts heretofore found by the court, are agreed to be in " addition to or in substitution therefor.

" Steamships which had been accepted under the first con- " tract for the transportation of the mails made trips outward " from San Francisco, carrying the United States mails, as " follows:

" The *China*	left	San	Francisco	October 16, 1873.
" The *Japan*	"	"	"	November 17, 1873.
" The *Colorado*	"	"	"	February 14, 1874.
" The *Alaska*	"	"	"	April 18, 1874.
" The *Japan*	"	"	"	June 13, 1874.
" The *Japan*	"	"	"	August 29, 1874.

" That all of said voyages or trips were made to Hong- " Kong *via* Yokohoma and return to San Francisco, except " that of the *Japan*, which left San Francisco August 29, " 1874. On that trip the *Japan* sailed only to Yokohama, " arriving there September 23d, and sailing thence on Sep- " tember 28th for, and arriving at, San Francisco on October " 21st, 1874.

" The mails carried outward bythe *Japan* on this trip were " taken from Yokohama to Hong-Kong by the steamship " *Nevada*, which sailed from Yokohama September 24th, and " arrived at Hong-Kong October 1st, 1874, and the *Japan* " on her return from Yokohama brought the mails which " had been forwarded from Hong-Kong by the steamship " *Costa Rica* on the 19th of September, 1874.

" The steamships *Nevada* and *Costa Rica* were extra " steamers of the plaintiff, which had not been accepted by " the Post-Office Department under either contract.

" The trip of the steamship *Japan*, which began from San " Francisco August 29th, 1874, succeeded a trip made by " the steamship *Colorado*, which left San Francisco on Au- " gust 13th, and by agreement was credited by the Post- " Office Department to the first contract as in completion of " the trip of the *Alaska*, which left San Francisco July 25th, " 1874, and in consequence of an accident at Hong-Kong was

"unable to complete her trip, and her mails were brought "by the *Colorado*.

"The Postmaster-General has entered an order herein in "the terms set forth in the annexed communication.

"The claimant has been paid as sea postages five hundred "and forty-nine $\frac{36}{100}$ dollars for transportation of mails "by the *China* on the trip of October 17th, 1874, and the "*Japan* of November 17th, 1874, before mentioned.

"J. F. FARNSWORTH,
"*Attorney for Plaintiff.*
"THOMAS SIMONS,
"*Ass't Att'y-General.*"

After the case was submitted the following letter was received from the Postmaster-General:

"POST-OFFICE DEPARTMENT,
"WASHINGTON, D. C., *May* 17, 1881.

"*To the Honorable the Justices of the Court of Claims:*

"I hereby respectfully inform the justices of the Court of "Claims that I have this day made the following order con- "cerning the matter pending, on mandate of the Supreme "Court, in the Court of Claims in the suit of the Pacific "Mail Steamship Company for compensation for postal ser- "vice between San Francisco and Hong-Kong, China, *via* "Yokohama, Japan, under contract with this Department "of 23d August, 1873, viz:

"In case the Court of Claims, in rendering a judgment in "conformity with the opinion of the Supreme Court of the "United States in the matter of the claim of the Pacific "Mail Steamship Company *vs.* The United States, on cross- "appeals from the judgment of the Court of Claims, (Nos. "201 and 202, October term, 1880,) shall hold that the trip "to Yokohama and return, which was commenced at San "Francisco, by the steamship *Japan*, on 29th August, 1874, "is to be accepted as having been performed under the con- "tract of 23d August, 1873, for the additional monthly ser- "vice between San Francisco and Hong-Kong *via* Yoko- "hama, it is ordered that a fine of thirteen thousand dollars "($13,000,) being at the rate of one thousand dollars for

" every twenty-four hours delay in the departure of said " steamship from San Francisco, (which occurred 13 days " after the sailing day fixed by said contract,) be imposed on " account of said delay, and the Court of Claims advised " thereof for such action as shall be deemed proper by the " said court.

"THOMAS L. JAMES,
"*Postmaster-General.*"

"CONCLUSION OF LAW.

" On the foregoing facts the court decides as conclusion " of law in regard to the trip which began with the sailing " of the steamer *Japan* from San Francisco on the 29th day " of August, A. D. 1874, that the claimants are entitled to " recover for the same the sum of $41,666.66 as a trip per- " formed in an accepted vessel under the contract, without " any deduction therefrom by reason of the alleged fine im- " posed by the Postmaster-General, and that the defendants " should be allowed the sum of $549.36 in making up the " judgment in this suit, the claimants having already received " that sum for sea postages from mail matter carried under " the contract in suit."

Record, pp. 25–26.

The only question made by the appellant on the rehearing in the Court of Claims under the mandate of this court, and remaining for the consideration of this court in the case, was and is in reference to the voyage of the steamer *Japan* on its trip from San Francisco, August 29, 1874.

First. It is claimed by the Attorney-General that the sailing of the *Japan* so late in the month as the 29th should not be considered a trip under the contract, or if it was a trip, it should be subject to a fine of a thousand dollars a day for delay of sailing from the 16th of the month to the 29th.

To answer this claim of the Attorney-General we have only to refer to the language of the contract itself, and to the

fact stated in the last "finding" of the Court of Claims. For the contract provides for the sailing of the ships from San Francisco on the 16th day of the month, "*or upon such "other days as may be hereafter selected with the approval "of the Postmaster-General, the departures to be always so "arranged as to alternate at equal and regular intervals with "those of the present monthly line*," etc., etc.

And the fact as agreed to by the parties, and stated by the Court of Claims that this trip of the *Japan* of August 29th succeeded a trip of the steamship *Colorado*, under the first contract, which left San Francisco, August 13th. Thus alternating at an interval of exactly half a month.

Besides, the fact of that trip commencing on the 29th of August was found on the first trial in the Court of Claims, and appeared in the record in this Court on the former trial.

Second. It is claimed that the appellee is not entitled to compensation for the transportation of the mails to and from Yokohama and Hong-Kong by that voyage of the *Japan* and the steamers which run in connection with the *Japan* between Yokohama and Hong-Kong, because the *Japan* herself only went as far as Yokohama.

The answer to this objection is given in the opinion of the Court of Claims.

No exception seems ever to have been taken by the Post-Office Department to that trip, or the manner in which the mails were carried out to Hong-Kong and return to Yokohama.

The semi-monthly mail service, which was the object of the contract, was performed; the mails delivered to the company, to be carried in the manner in which they were carried, were safely transported to their destination. It was a substantial compliance with the terms of the contract.

Besides, we have a right to *presume* that the Post-Office Department, for good reasons, *approved* that proceeding.

The fact that the *Japan* was turned about at Yokohama for the purpose of expediting the mails already there for the United States may be inferred from the record.

The presumption is that the Postmaster-General, who was at the head of that Department at that time, performed his duty.

The present Postmaster-General, James, is the third successor of that office. Rather late, we submit, for the present Postmaster-General to be taking exceptions or imposing penalties in reference to a service which received the sanction of, and was regulated by, a predecessor seven years ago.

The *time* or *dates* of sailing of the ships from San Francisco was never regarded as of the essence of either of the contracts. It was only important that those dates should be so arranged that vessels should leave at intervals of half a month, or nearly so. The contingencies incident to voyages so long as those were made it impossible to fix beforehand the precise date when a vessel should arrive or depart.

Thus under the first contract the vessels did not always leave on the first of the month. Sometimes they left earlier and sometimes later.

The *Alaska* left on the 25th of July, six days before the first of August. By an acident this ship was disabled at Hong-Kong, so that she could not make the return voyage.

This necessarily somewhat disarranged the inward mails for a short time and compelled the company to despatch the mails between Hong-Kong and Yokohama by special steamers for two or three trips.

The mails which, but for the disabling of the *Alaska*, would have been brought by her were sent to Yokohama by a special steamer, where they were met by the *Colorado* (an accepted vessel which left San Francisco the 13th of August) and brought to the latter post, arriving the 3d of October. This was accepted by the Postmaster-General as a comple-

tion of the trip of the *Alaska* under the first contract. The mails taken *outward* by the *Colorado* were despatched by special steamers from Yokohama to Hong-Kong.

The *Japan* sailed on her outward voyage the 29th of August; arriving at Yokohama she met mails which had been brought by special steamer (which would have been a continuation of the trip of the *Colorado*, had she gone to Hong-Kong) from Hong-Kong; so she was turned around at Yokohama, and arrived at San Francisco on the 21st of October.

Thus the *inward mails*, of *equal importance with the outward*, were brought at intervals of as nearly half a month as the contingencies of the sea would permit.

The Government got its semi-monthly service, outward and inward, and, in addition, *one* outward voyage to Yokohama. These all in accepted vessels, *except* two trips between Hong-Kong and Yokohama.

The record does not state in so many words that the *Colorado* was turned about at Yokohama, but it does state (see last finding Court of Claims) that she left San Francisco on the 13th of August, and returning arrived at San Francisco on the 3d of October, carrying the mails both outward and inward. She was gone fifty days, and it is a well-known fact that the voyage could not be made to Hong-Kong and return in that length of time. Therefore we have the right to assert the fact that the *Colorado* was turned around at Yokohama, and that it had the approval of the Postmaster-General. And we think that the court should not presume, in consideration of all these facts, that the turning about of the *Japan* at Yokohama was not with the approval and consent of the Post-Office Department.

The mails brought by the *Japan* from Yokohama included the mails which were despatched from Hong-Kong on the 19th of September, and the mails carried outward by the

Japan on that trip arrived at Hong-Kong on the first of October.

The *Japan*, on her return, arrived at San Francisco on the 21st of October. Thus were these trips evidently so arranged as to make as nearly as possible a semi-monthly mail service, as required by the two contracts. (*See last finding Court of Claims.*)

If, instead of turning about at Yokohama, the *Japan* had kept on to Hong-Kong, she could not have left that port with the mails before from the 2d to the 5th of October, or arrived at San Francisco earlier than about the 5th of November. That would have delayed the mails nearly half a month.

The mails were largest between Japan and the United States, while the freight business was largest with China; and it is absurd to suppose that the company would turn around one of its largest steamers at Yokohama to bring the mails to the United States with the disapprobation of the Postmaster-General, or without his approval and direction, and with an earnest effort to perform its contract.

J. F. FARNSWORTH,
WM. E. CHANDLER.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1127.

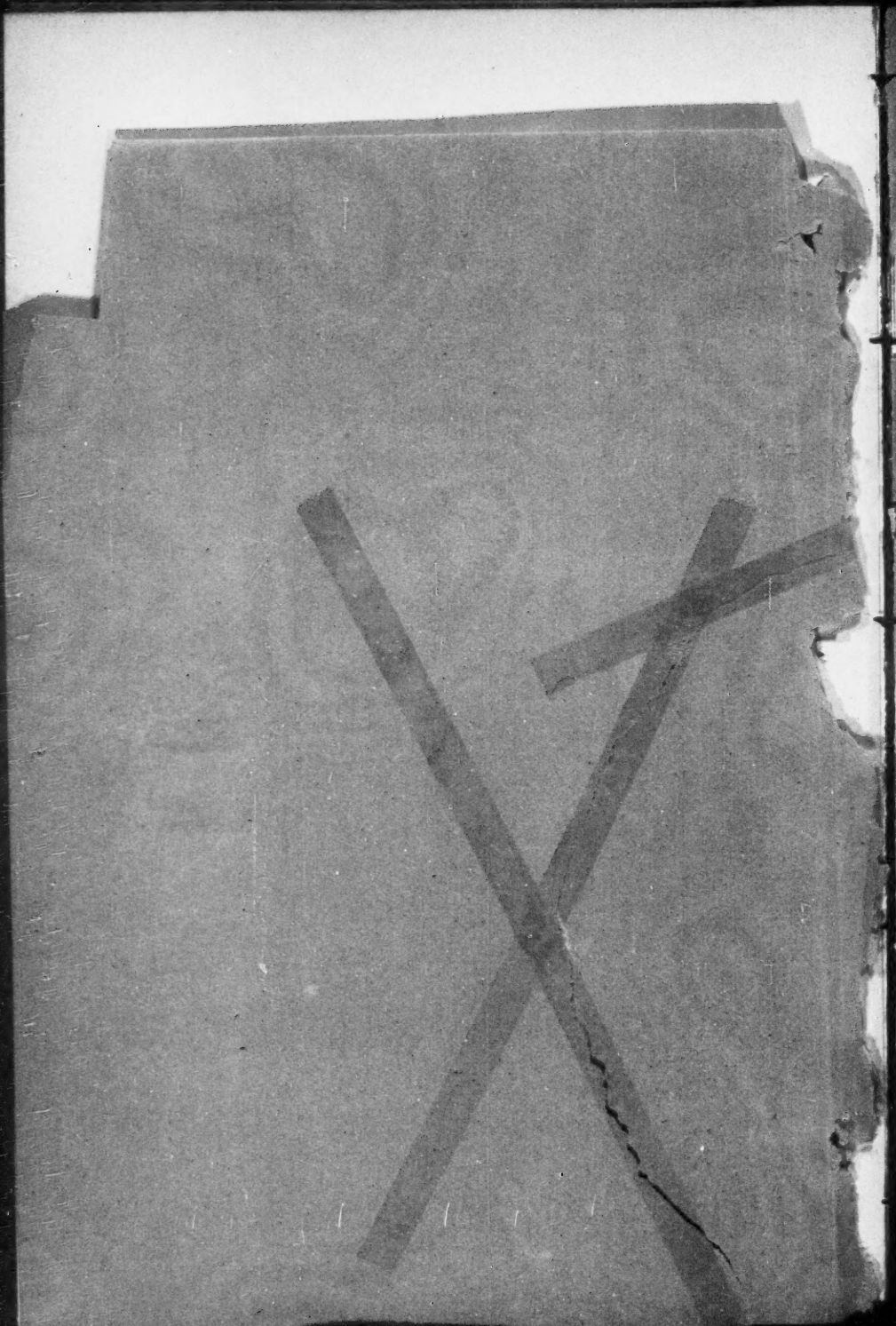
COLLIS P. HUNTINGTON, APPELLANT,

vs.

CHARLES E. PALMER, TAX COLLECTOR OF THE COUNTY OF ALAMEDA, AND THE CENTRAL PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 2, 1881.



SUPREME COURT OF THE UNITED STATES.

No. 1127.

COLLIS P. HUNTINGTON, APPELLANT,

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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1 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit, district of California.
In equity.

The President of the United States of America, greeting, to Chas. E. Palmer, tax collector of the county of Alameda, State of California, and the Central Pacific Railroad Company:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the first Monday of April, A. D. 1881, to answer a bill of complaint exhibited against you in said court by Collis P. Huntington, who is a citizen of the State of New York, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty of five thousand dollars.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of February,
2 in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the 105th.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

Memorandum pursuant to Rule 12, *Supreme Court U. S.*—You are hereby required to enter your appearance in the above suit, on or before the first Monday of April next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

OFFICE OF U. S. MARSHAL,
District of California.

I hereby certify that I received the within writ on the 23d day of February, 1881, and on the 24th day of February, 1881, at Oakland,
3 in the county of Alameda, in this district, I personally served the same on Chas. E. Palmer, tax collector of the county of Alameda, State of California, one of the defendants named herein, by delivery to and leaving with said defendant personally an attested copy of this writ, together with a copy of the bill of complaint in this cause, duly certified by McAllister & Bregin, solicitors for complainant, a copy of the affidavit of E. Black Ryan, and an attested copy of the order to show cause, and restraining order attached thereto.

[SEAL.] A. W. POOLE,
U. S. Marshal,
By HORACE BACON,
Deputy.

(Endorsed:) Filed 28 Feb., 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

I hereby acknowledge service of a copy of the annexed writ, together with a copy of bill of complaint, affidavit of E. Black Ryan, order
4 to show cause, and restraining order attached thereto, this 26th day of February, 1881.

CENTRAL PACIFIC R. R. CO.,
By E. H. MILLER, JR., *Secretary.*

5 *Complaint.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHAS. E. PALMER, TAX COLLECTOR OF THE county of Alameda, State of California, and The Central Pacific Railroad Company, defendants.
} Bill in equity.

To the honorable the circuit judges of the United States, in and for the district of California:

I. The bill of complaint of Collis P. Huntington, complainant, respectfully shows unto your honors that he is, and during all the times hereinafter stated was, a citizen of the State of New York, residing therein.

6 II. That the above-named defendants, and every of them, are citizens of the State of California, residing therein.

III. That the defendant Chas. E. Palmer, on January first, A. D. 1881, and from thence hitherto has been and still is the duly elected, qualified, and acting tax collector in and for the county of Alameda, State of California.

IV. That on January first, A. D. 1879, and long prior thereto, the above-named defendant The Central Pacific Railroad Company was and still is a corporation duly organized and acting under the laws of the State of California, for the purpose of constructing, owning, and operating a railroad therein, and on January first, A. D. 1880, and long prior thereto, and from thence hitherto, said corporation was and still is a railroad corporation operating in more than one county in this State, to wit, in the counties of San Francisco, Alameda, Sacramento, and other counties in said State of California.

V. That on April 30th, A. D. 1880, and long prior thereto, and thence hitherto, Warren Dutton, James L. King, M. M. Drew, T. D.

7 Heiskell, and D. M. Kenfield constituted and still constitute the State board of equalization of the State of California.

That on the day and year last stated, to wit, April 30th, 1880, at the city of Sacramento, in said State, said State board of equalization did make a certain pretended assessment in the words and figures following, to wit:

"The State board of equalization being in session, all the members thereof being present, and having under consideration the assessment of the franchise, road-way, road-bed, rails, and rolling-stock of the Central Pacific Railroad Company within this State, for the year 1880, and it appearing to this board that said company, on the first Monday in March, in the year 1880, at twelve o'clock meridian of that day, owned and operated and still owns and operates six hundred and four miles of railroad in this State, and in more than one county, being the entire railway of said company within this State; and that the actual cash value of said property, namely, the franchise, road-way, road-bed,

8 rails, and rolling-stock of said company, within this State at the said date and time in March, was and still is the sum of twelve millions two hundred and thirty-nine thousand four hundred and fifty-six dollars, which said entire railway is described as follows, to wit:

"Line of road-way, road-bed, and rails running from Fifth (5th) street, in the city of San Francisco, through South Beach, blocks 15, 20, 159, 165, and South Beach Block 9, to the water-front of said city.

"Also between Kentucky and Illinois streets, from North Potrero, block 407, to Fourth (4th) and King streets.

"Also from the end of Long Wharf, Oakland, in an easterly direction, through First and Seventh streets to east line of the town of Brooklyn.

"Also from Seventh street, Oakland, to the town of Alameda, and from Oakland Point to channel of San Antonio Creek, with branches from main line to the town of Alameda, thence from the depot in Brooklyn easterly to Niles.

"Also from depot in the town of San José to Niles, thence
9 from Niles, through Alameda, San Joaquin, Sacramento, Placer, Nevada, and Sierra Counties, to the west line of the State of Nevada.

"Also beginning at a town called Roseville, in Placer County, running thence in a general northerly course to the town of Reading.

"Also beginning at Lathrop, in San Joaquin County, running thence in a southerly and easterly course to the town of Goshen, in Tulare County, being four miles in the city of San Francisco, eighty-five $\frac{30}{100}$ ($85\frac{30}{100}$) miles in the county of Alameda, eight $\frac{50}{100}$ ($8\frac{50}{100}$) miles in the county of Santa Clara, fifty-six $\frac{75}{100}$ ($56\frac{75}{100}$) miles in the county of San Joaquin, forty-one (41) miles in the county of Sacramento, one hundred and twelve $\frac{75}{100}$ ($112\frac{75}{100}$) miles in the county of Placer, thirty $\frac{25}{100}$ ($30\frac{25}{100}$) miles in the county of Nevada, two $\frac{15}{100}$ ($1\frac{15}{100}$) miles in the county of Sierra, fifteen $\frac{87}{100}$ ($15\frac{87}{100}$) miles in the county of Yuba, ten (10) miles in the county of Sutter, forty-five (45) miles in the county of Butte,
10 forty $\frac{54}{100}$ ($40\frac{54}{100}$) miles in the county of Tehama, eighteen $\frac{89}{100}$ ($18\frac{89}{100}$) miles in the county of Shasta, twenty-two $\frac{63}{100}$ ($22\frac{63}{100}$) miles in the county of Stanislaus, thirty-six $\frac{75}{100}$ ($36\frac{75}{100}$) miles in the county of Merced, sixty-one $\frac{6}{100}$ ($61\frac{6}{100}$) miles in the county of Fresno, twelve $\frac{65}{100}$ (12.65) miles in the county of Tulare, making the entire length of railway six hundred and four miles.

Therefore it is hereby ordered that said property for the year 1880 be, and the same is hereby, assessed to said Central Pacific Railroad Company for the said last-mentioned sum in manner following, to wit:

"The franchise at the rate of two thousand dollars ($2,000) per mile, making the sum one million two hundred and eight thousand dollars	$1,208,000
"The road-way, road-bed, and rails, at the rate of eleven thousand eight hundred dollars ($11,800) per mile, making the sum of seven millions one hundred and twenty-seven thousand two hundred dollars	7,127,200
11 "The rolling-stock at the rate of six thousand four hundred and sixty-four dollars ($6,464) per mile, making the sum of three million nine hundred and four thousand two hundred and fifty-six dollars	3,904,256
"Making a grand total of twelve millions two hundred and thirty-nine thousand four hundred and fifty-six dollars	12,239,456

VI. That on or before May 15th, 1880, said State board of equalization did transmit to the county assessor of said county of Alameda, State of California, being one of the counties through which said railroad was and still is operated, a statement showing the length of the main track of such railway within said county, and the pretended

assessed value per mile of the same as fixed by a pro rata distribution per mile of the whole property named in said assessment hereinbefore set forth, which statement so transmitted to said assessor was, on the receipt thereof, entered on the assessment-roll of said county, and at the first meeting of the board of supervisors of said county after the receipt of said statement by said county assessor said board of supervisors of said county did make and cause to be entered in the proper record-book an order stating and declaring the length of the main track of said railway company and the assessed value of said railway company lying in each city, town, township, school district, or lesser taxing district in said county, as fixed by the State board of equalization as aforesaid, as the taxable value of the property of said corporation for taxable purposes in said city, town, township, school, road, or other district, and the clerk of the board of supervisors of said county did thereupon transmit a copy of such order to the city council or trustees of the incorporated cities and towns, and the trustees of each school district and the authorized authorities of other taxing districts in said county, through which said railroad runs, and thereafter, and within the time prescribed by law, the sum of $22,864.24 was set down in the proper book of records of said county, as the tax against said railway company, and the same now appears thereon as a pretended tax against the property of said railway corporation. That the duplicate assessment-roll of said county, whereon said pretended tax appears inscribed as aforesaid, has been placed in the hands of said Chas. E. Palmer, as the tax collector of said county, who, under and by virtue thereof, and not otherwise, has advertised the property of said railroad company as delinquent for non-payment of said pretended tax, and gives out and threatens, and unless restrained by this honorable court, your orator verily believes that said defendant Chas. E. Palmer, as tax collector of said county as aforesaid, will on the 1st day of March, A. D. 1881, sell the said property of said corporation for non-payment of said pretended tax, if the same be not paid.

VII. Complainant further shows to your honors, that said tax and the assessment whereon the same was founded, were and are void in the particulars and respects following, to wit:

1st. Section twenty-four of article four of the constitution of said State of California, provides that "Every act shall embrace but one subject, which subject shall be expressed in its title; but if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

That said State board of equalization pretended to make said pretended assessment under and by virtue of the provisions of that certain act of the legislature of the State of California, approved March 22d, 1880, entitled "An act to amend sections three thousand six hundred and seven, three thousand six hundred and seventeen, three thousand six hundred and twenty-seven, three thousand six hundred and twenty-eight, three thousand six hundred and twenty-nine, three thousand six hundred and thirty, three thousand six hundred and thirty-four, three thousand six hundred and forty, three thousand six hundred and forty-three, three thousand six hundred and fifty, three thousand six hundred and fifty-one, three thousand six hundred and fifty-two, three thousand six hundred and sixty-three, three thousand six hundred and seventy-three, three thousand six hundred and seventy-eight, three thousand six hundred and seventy-nine, three thousand seven hundred and seventeen, three thousand seven hundred

and thirty, three thousand seven hundred and fifty-two, three thousand seven hundred and fifty-six, three thousand eight hundred and thirty-nine, three thousand eight hundred and sixty-one, and to repeal sections three thousand six hundred and eighty, and three thousand eight hundred and eighty-seven, of an act entitled 'An act to establish a political code,' approved March 12th, 1872, relating to revenue, and to add two new sections numbered three thousand six hundred and sixty-four and three thousand six hundred and sixty-five."

And said last-mentioned act of the legislature did embrace more
16 than one subject, and the subjects thereof were not expressed in the title of said last-mentioned act of the legislature. That the title of said last-mentioned act of the legislature, did not express or declare the subject of the sections therein respectively designated, sections three thousand six hundred and sixty-four and three thousand six hundred and sixty-five, and the subject embraced by and treated in said last-mentioned respective sections, is not in whole or in part expressed or declared in the title of said last-mentioned act of the legislature. That said State board of equalization, in making said pretended assessment, did pretend to act under and by virtue of said last-mentioned act of the legislature, and not otherwise.

2d. That in and by section one of article three of the constitution of said State of California it is provided that "the powers of the government of the State of California shall be divided into three separate departments, the legislative, executive, and judicial, and no person charged with the exercise of powers properly belonging to one of
17 these departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted."

That notwithstanding said last-mentioned provisions of the constitution of the State of California the legislature of said State did, by an act approved April 16th, 1880, entitled "An act to amend section three thousand seven hundred and thirteen of the political code," enact as follows, to wit:

"Section 1. Section 3713 of the political code is hereby amended so as to read as follows:

"3713. The State board of equalization must, for State purposes, for the thirty-second fiscal year, fix such ad valorem rate of taxation upon each one hundred dollars of taxable property of this State as will raise for the thirty-second fiscal year—

First. For the general fund, one million seven hundred and fifty thousand dollars;

Second. For the school fund, one million four hundred thousand dollars;

Third. For the interest and sinking fund, three hundred and
18 fifteen thousand dollars."

That the title of said last-mentioned act of the legislature does not express the subject of said last-mentioned act of the legislature, and the subject of said last-mentioned act of the legislature is not expressed in the title thereof. That said last-mentioned act of the legislature was, and is, wholly in contravention of the provisions of the constitution of the State of California last hereinbefore stated, and in further contravention of the provisions of section one and article four of said constitution. That in and by said last-mentioned act of the legislature the legislature of the State of California undertook to delegate to the State board of equalization aforesaid the power and authority to fix the rate of taxation for the fiscal year therein mentioned, and that

there was not, and is not, any other law of the State of California whereby the rate of taxation for said fiscal year is provided other than said last-mentioned act of the legislature. That by reason of the
19 premises last stated said last-mentioned act of the legislature was, and is, unconstitutional and void.

3d. That in and by section ten, article thirteen, of said constitution, it is provided among other things that "the franchise, roadway, road-bed, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization at their actual value."

That the State board of equalization, in making said pretended assessment, did assess the property therein described, not at the actual value thereof, but according to the actual cash value thereof.

4th. That in and by section two of article thirteen of the constitution of said State of California it is provided that "land, and the improvements thereon, shall be separately assessed;" and in and by section ten, article thirteen, of said constitution it is provived as hereinbefore last stated; yet in said pretended assessment said State board of equalization did not separately assess the franchise (1), the roadway (2), the road-bed (3), the rails (4), the rolling-stock (5),
20 but did assess the same in the manner in said pretended assessment set forth.

5th. That said State board of equalization in making said pretended assessment did not assess the franchise, roadway, road-bed, rails, and rolling-stock of said corporation at their actual value, but did knowingly, wilfully, and intentionally not only assess the same at the actual value thereof, but did knowingly, wilfully, and intentionally superadd thereto and assess the same according to the income derived from the use of the same, and in assessing the same did take into account and did pretendedly assess not only the actual value thereof, but did likewise assess and include in said pretended assessment the lucrative character of the business done by said railroad upon said franchise, roadway, road-bed, rails, and rolling-stock of said corporation, and did assess the same not only at the actual value thereof, but at the actual value thereof as increased by the supposed lucrative business done upon the line of said railroad. That by taking into account the supposed lucrative character of the business done upon the line of
21 said railroad company, and including the same in said pretended assessment, said State board of equalization did thereby wilfully, knowingly, and intentionally increase said assessment at least one-third over and above the actual value of the franchise, roadway, road-beds, rails, and rolling-stock of said corporation, and said State board of equalization, as complainant is informed and believes, and upon and according to such information and belief avers, did therein and thereby knowingly, wilfully, and intentionally design to discriminate, as against said corporation, in favor of other taxpayers in the State, and did therein and thereby knowingly, wilfully, and intentionally design and intend to assess said corporation at a higher rate than the individual taxpayers of said State.

That although the legislature of said State of California has not enacted any law whereby income taxes may be assessed to and collected from persons, corporations, joint-stock associations, or companies resident or doing business in said State, yet the said State board of
22 equalization in and by their said pretended assessments have knowingly, wilfully, and intentionally, in effect, assessed income

taxes upon the income of said Central Pacific Railroad Company derived by and from the use of its said railway.

6th. That in and by section nine, article thirteen of the constitution of said State of California, said State board of equalization is created, "whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation," yet complainant is informed and believes, and upon and according to his information and belief avers and shows to the court, that although said pretended assessment of the property of said corporation as aforesaid was grossly unequal and far in excess of the value of property of the same description of natural persons in said State at the time, upon proof thereof being made to said State board of equalization within the time allowed therefor, with respect to the property of all other taxpayers in said State, and request in that behalf
23 duly made by and upon behalf of said corporation to equalize the assessment of its said property embraced in and described in said pretended assessment, yet the said board knowingly, wilfully, and intentionally, under the pretence that it had no power to equalize the same, did wholly refuse to equalize the pretended assessment of the property of said corporation hereinbefore described, and did wholly refuse to assess the same at their actual cash value as the property of individual taxpayers in said State was assessed and equalized. That by reason of the premises said State board of equalization have knowingly, wilfully, and intentionally, and with a view, design, and intent to discriminate in favor of individual taxpayers as against said corporation, assessed said property of said corporation one-third of the amount of said pretended assessment over and above what the same property of individual taxpayers of said State was assessed.

24 7th. That said pretended assessment is the only assessment of said property of said corporation, and the pretended tax for nonpayment whereof said tax-collector as aforesaid threatens to sell said property is founded upon said pretended assessment and upon no other assessment.

VIII. Complainant shows to your honors that for two years last past and upwards he was and still is a stockholder of said Central Pacific Railroad Company, owning 1,000 shares and upwards of the capital stock thereof, standing in his name upon the books of said corporation, and while so stockholder of said corporation, and on or about the 15th day of December, A. D. 1880, at the city and county of San Francisco, complainant did inform and cause to be informed the board of directors of said Central Pacific Railroad Company of the invalidity of said pretended assessment and the tax founded thereon, and did then and there request said board of directors not to pay said tax or any tax founded upon said pretended assessment
25 and did then and there request said board of directors to take such action or legal proceedings as might be proper in the premises to test and determine the validity of said pretended assessment, and the pretended taxes founded thereon, yet the board of directors of said Central Pacific Railroad Company did then and there, knowingly, intentionally, and wilfully, absolutely refuse so to do or to take any action in the premises, and complainant is informed and believes, and upon and according to his information and belief he alleges, that unless restrained by this honorable court said board of directors of said Central Pacific Railroad Company will pay said unfounded and illegal taxes out of the funds of said Central Pacific Railroad Company, to the mani-

fest injury and detriment of the stockholders thereof and of this complainant.

IX. Complainant avers that he institutes this action on his own behalf, and also on behalf of all other stockholders of said Central Pacific Railroad Company who shall, in due time, come in and
26 contribute to the expen'es of the prosecution thereof.

X. Complainant avers that he is entirely remidiless in the premises according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable.

Wherefore complainant prays that said pretended assessment and any and all taxes founded thereon be adjudged and declared to be null and void; that said Central Pacific Railroad Company and the board of directors thereof, and every of them, and its agents, attorneys, and servants, be enjoined and restrained from paying said tax or any tax or any part of any tax founded upon said pretended assessment out of any of the corporate funds or assets of said corporation; and that said defendant, tax-collector as aforesaid, be enjoined and restrained from collecting any tax founded upon said pretended assessment, by seizure or forced sale or otherwise. That a temporary injunction may
27 issue against each of the defendants herein, enjoining and restraining them and every of them, their agents, attorneys, and servants, respectively, as hereinbefore prayed; and that upon the final hearing hereof the said injunction may be made perpetual by the decree of this honorable court, and that your complainant may have such other or further relief or both in the premises as the nature of his case shall require and to your honors shall seem meet.

May it please your honors to grant unto complainant the most gracious writ of subpœna of the United States of America, to be directed to said defendant, tax-collector aforesaid, and said Central Pacific Railroad Company, commanding them and every of them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein as to your honors may seem meet; and the complainant will ever pray, &c.

McALLISTER & BERGIN,
Solicitors for Complainant.

28 UNITED STATES OF AMERICA,
District of California, ss:

On this 18th day of February, A. D. 1881, appeared John T. Haviland, who, upon oath, says that he is the duly authorized attorney in fact of Colis P. Huntington, the complainant named in the foregoing bill of complaint, and that he is personally knowing to the matters and things in said bill of complaint set forth; that he has read said bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters that he believes it to be true. Affiant verifies this bill of complaint for the reason that said complainant is absent from this State and is living in the State of New York.

JOHN T. HAVILAND.

Subscribed and sworn to before me this 18th day of February, A.D. 1881.

[SEAL.] J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed February 19, 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

29 *Demurrer.*

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHARLES E. PALMER, TAX-COLLECTOR OF THE county of Alameda, State of California, and the Central Pacific Railroad Company, defendants. } Demurrer.

The demurrer of Chas. E. Palmer, one of the defendants to the bill of complaint of Collis P. Huntington, complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer showeth that the said complainant hath not by his
30 said bill made such a case as doth or ought to entitle him to any such relief as is therein sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

A. L. HART,
Att'y-Gen'l of Cal.,
& RHODES & BARSTOW,
Solicitors for Chas. E. Palmer, Tax-Collector for Alameda County, one of the Defendants.

The above-named solicitors for the said defendant Charles E. Parmer do hereby certify that they have examined the complainant in the above-entitled action, and that in their opinion the above demurrer to said complaint is well founded in point of law.

A. L. HART,
Att'y-Gen'l of Cal.,
& RHODES & BARSTOW,
Solicitors for said Defendant.

(Endorsed:)
Received copy within demurrer this M'ch 14, 1881.
McALLISTER & BERGIN.
Filed March 14, 1881. L. S. B. Sawyer, clerk.

31 *Amendment to complaint.*

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT, *vs.* CHAS. E. PALMER, TAX-COLLECTOR OF THE county of Alameda, State of California, and the Central Pacific Railroad Company, defendants.	Amendment to bill of complaint.

The complainant in the above-entitled cause, by leave of court first duly had and obtained in this behalf, hereby amends his bill of complaint herein by adding thereto, after subdivision 8 of said bill of complaint, as follows, to wit:

Complainant further shows to the court that on July 28th, 1868, adoption of article 14 of the Constitution of the United States was officially proclaimed, which among other things provides that:

32 "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

That section 10, article 13, of the constitution of the State of California among other things provides as follows, to wit:

"The franchise, roadway, road bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization, and at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts," is in contravention of

33 the provisions aforesaid of said article XIV of the Constitution of the United States, in this, that it discriminates unfairly and unequally against railroad corporations, and especially against said Central Pacific R. R. Co., in this:

That whereas under section 4 of said article XIII of the constitution of the State of California, if an individual have a mortgage, lien, or incumbrance upon his real estate, he is liable to assessment and taxation thereon only for the value of his interest in such real estate over and above the amount of such mortgage, lien, or incumbrance.

Whereas in the case of a railroad no such allowance is made with respect to any mortgage, lien, or incumbrance there may be upon its property. That during the several times herein stated there was and is a lien upon the property of said Central Pacific R. R. Co. of $27,000,000, in favor of the Government of the United States, and $27,000,000, or thereabouts, in favor of parties other than the United States, and upon and according to his information and belief, complainant avers that, in making the aforesaid pretended assess-

34 ment, said board of equalization made no deduction or allowance on account of said liens.

Complainant further avers and charges that said pretended assessment was made upon illegal principles, yet the same has come into the hands of said tax-collector for collection by forced sale of the franchise, roadway, road-bed, rails, and rolling-stock of said railroad company, and

said tax-collector will sell the same at public auction, pursuant to the statutes of said State, and will give to the purchasers thereof certificates of sale, and, in due time thereafter, deeds, which deeds, under the laws of said State, will be conclusive evidence of the validity of said assessment, unless said company pays said taxes voluntarily, or said tax-collector be enjoined and restrained from making such sale. That if said franchise, roadway, road-bed, rails, and rolling-stock of said railroad company be sold, as aforesaid, for the collection of said pretended taxes, or if said company voluntarily pays the same, the capital stock of said company owned by said complainant will be
35 rendered valueless in the first instance, and in the second place the complainant will be deprived, in a measure, of his just proportion of the dividends of said corporation as a stockholder thereof.

That under the laws of this State, said tax-collector is compelled to pay into the treasury, State or city and county, as the case may be, all taxes by him collected, whether the same were legally or illegally paid, and no protest on the part of the taxpayer can avert or prevent such payment into the treasury; that there is no provision made by the laws of this State for refunding to taxpayers taxes that may be illegally paid into the treasury, whether of the State or of said city and county.

Wherefore he prays as hereinbefore first prayed.

McALLISTER & BERGIN,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of California, ss:

On this 28th day of March, A. D. 1881, appeared John T. Haviland, who, upon oath, says that he is the duly authorized attorney in fact of Collis P. Huntington, the complainant named in the foregoing amendment to bill of complaint, and that he is personally knowing to the matters and things in said bill of complaint set forth;
36 that he has read said bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters that he believes it to be true. Affiant verifies this bill of complaint for the reason that said complainant is absent from this State, and is living in the State of New York.

JOHN T. HAVILAND.

Subscribed and sworn to before me this 28th day of March, A. D. 1881.

[SEAL.]

J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:)

We consent to the filing of this amendment, and that demurrer to bill of complaint heretofore interposed shall stand as the demurrer to the bill as amended.

A. L. HART,
Att'y-General for California,
And RHODES & BARSTOW,
Solicitors for said Defendant.
McALLISTER & BERGIN,
Solicitors for Complainant.

Service and receipt of a copy of within amendment to bill of complaint admitted this 2 day of April, 1881.

A. L. HART,
Att'y-Gen. of Cal.,
& RHODES & BARSTOW,
Solicitors for Defendant Palmer.

Filed April 4th, 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

37 *Enrollment.*

At a stated term, to wit, the July term, A. D. 1881, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday the fifteenth day of August, in the year of our Lord one thousand eight hundred and eighty-one.

Present, the honorable Lorenzo Sawyer, circuit judge; the honorable Ogden Hoffman, district judge.

COLLIS P. HUNTINGTON, COMPLAINANT,
versus
CHARLES E. PALMER, TAX-COLLECTOR OF the county of Alameda, State of California, and the Central Pacific Railway Company, defendants. } In equity. No. 2510.

The complainant filed his bill of complainant which is hereto annexed on the 19th day of February, A. D. 1881.

38 Thereupon a subpœna to appear and answer herein was issued, returnable on the first Monday of April, A. D. 1881, and service thereof made upon both of said defendants prior to the return day thereof.

Said subpœna, with the marshal's return of service thereon endorsed, is hereto annexed.

On the 14th day of March, A. D. 1881, the defendant Charles E. Palmer filed a demurrer to said bill, which demurrer is hereto annexed.

On the 4th day of April, 1881, an amendment to the said bill of complaint was filed, which amendment is hereto annexed.

Thereafter, to wit, on the 15th day of August, A. D. 1881, a final decree was filed and entered herein in the words and figures following, to wit:

At a stated term, to wit, the July term, A. D. 1881, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room, in the
39 city and county of San Francisco, on Monday the fifteenth day of August, in the year of our Lord one thousand eight hundred and eighty-one.

Present, the honorable Lorenzo Sawyer, circuit judge; the honorable Ogden Hoffman, district judge.

Decree.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHARLES E. PALMER, TAX-COLLECTOR, ET AL., defendants. } No. 2510.

This cause came on to be heard at the last term upon a demurrer to the bill and was argued by counsel; and thereupon upon consideration thereof it is ordered, adjudged, and decreed that the demurrer be, and the same hereby is, sustained and the said bill dismissed.

(Signed) SAWYER,
Circuit Judge.

(Signed) HOFFMAN,
Dist. Judge.

(Endorsed:) Filed and entered August 15, 1881. L. S. B. Sawyer, clerk.

40 Whereupon said pleadings, subpœna, and final decree are hereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, &c.,
[SEAL.]
L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:) Enrolled papers. Filed August 15, 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y clerk.

41 *Affidavit of E. B. Ryan.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHAS. E. PALMER, TAX COLLECTOR OF THE county of Alameda, State of California, and The Central Pacific Railroad Company, defendants.

DISTRICT OF CALIFORNIA,
City and County of San Francisco, ss:

E. Black Ryan, being duly sworn, deposes and says, on oath: I am now, and for seven years last past have been, a resident of the city and county of San Francisco, district aforesaid. I have heard read the bill of complaint in the above-entitled cause, and know the contents thereof.

Upon behalf of the defendant corporation in said bill of complaint named, I attended upon the State board of equalization as in said
42 bill of complaint mentioned, and I know that the action of said State board of equalization with reference to the assessment in the bill of complaint mentioned, as in said bill of complaint set forth, is true.

Upon behalf of said corporation, and within the time prescribed therefor by law, I furnished said State board of equalization the return whereof a correct copy is hereto annexed, and the said return, and the

contents thereof, and the statements therein contained, were and are true; and the appraisement and valuation therein set down were and are fair and just.

I further state that, upon behalf of said corporation, I attended to the matter of the assessment of the property described in the bill of complaint in said cause, and solicited to know when said State board of equalization would assess the same, but although I diligently sought to be informed of and know when said State board of equalization would assess the same, I was not notified thereof and could not learn the same, and said corporation had no knowledge of the time of making
43 said assessment, and no opportunity to show that the same was being made excessive.

After the making of the assessment complained of in said bill of complaint, I, on behalf of said corporation, made application to said State board of equalization to reduce the amount of said assessment, and competent and uncontradicted testimony was adduced to said board, showing that the same should be reduced as in the bill of complaint claimed, yet said State board of equalization refused and declined to equalize the same, or to reduce the amount of said assessment.

E. BLACK RYAN.

Subscribed and sworn to before me this 18th day of February, A. D. 1881.

[SEAL.]

J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

RAILROAD.

The Central Pacific Railroad Company makes the following statement of its property subject to taxation in the State of California, for the fiscal year 1880–1:

44 The entire length of railroad of said company in California is 604 miles, operated in the following counties of said State, with the length of said railroad in each:

County.	Miles.	County.	Miles.
		Am't bro't up	366.57
San Francisco	4.00	Butte	45.00
Alameda	85.30	Tehama	40.54
Santa Clara	8.50	Shasta	18.80
San Joaquin	56.75	Stanislaus	22.63
Sacramento	41.00	Merced	36.75
Placer	112.75	Fresno	61.06
Nevada	30.25	Tulare	12.65
Sierra	2.15		
Yuba	15.87		
Sutter	10.00		
	366.57	Total	604.00

ROLLING-STOCK.

The entire amount of rolling-stock on said company's railroad in said State, to be apportioned pro rata to the above counties, is as follows:

No.	Kind.	Value.
122	locomotives	$634,400 00
12	sleeping-cars	36,000 00
87	passenger-cars	121,800 00
65	emigrant and smoking-cars	65,000 00
32	baggage, express, and mail cars	25,600 00
44	caboose-cars	30,800 00
45	1,629 box freight-cars	651,600 00
1,290	flat freight-cars	322,500 00
360	dump, hand, section, and all other cars	25,800 00
	Total	$1,913,500 00

Description of property.	Value.
Line of roadway, road-bed, and rails, running from 5th st., San F'co through S. B. blocks 15, 20, 159, 165, and S. B. block 9 to the water-front. Also, bet. Kentucky and Illinois sts., from N. P. block, 407 to 4 and King sts.	
Also, from the end of Long Wharf, Oakland, in an easterly direction through 1st and 7th sts., to E. line of Brooklyn	
Also, from 7th st., Oakland, to Alameda, and from Oakland point to channel of San Antonia Creek, with franchise from main line to Alameda, th' from the depot in Brooklyn easterly to Niles. Also, from the depot in San José to Niles, th' from Niles through Alameda, San Joaquin, Sac'to, Placer, Nevada, and Sierra Counties to the W. line of the State of Nevada	
Also, beg. at Roseville, in Placer County, running th' in a general northerly course to the town of Redding	
46 Also, beg. at Lathrop in San Joaquin County, running th' in a southeasterly course to Goshen	
Being a total length of line and branches, 604 miles, with roadway, road-bed, rails, and franchise valued at $6,000 per mile	

RECAPITULATION.

	Miles.	Value per mile.	Total value.
Franchise		04[14]	25 00
Roadway and road-bed	604.00	1,564 95[86]	945,235 00
Rails		4,435 00	2,678,740 00
	604.00	$6,000.00	$3,624,000 00

Following is the apportionment of the value of the railroad and rolling-stock of said Central Pacific Railroad Company to the several counties, townships, or districts herein named:

County, t's'p and district.		Miles.	Pro rata.
San Francisco		4.00	36,672 18
Alameda County.	Oakland T's'p	12.50	114,600 65
	Brooklyn "	8.96	82,145 65
	Alameda "	6.08	55,741 70
	Eden "	10.35	94,889 30
	Washington "	17.70	162,274 40
	Murray "	29.71	272,382 65
	Santa Clara Co	8.50	77,928 40
	San Joaquin "	56.75	520,286 62

Sacramento		41.00	375,889 90
Placer Co., 1st dist.		36.75	336,925 70
47 " 2d "		76.00	696,771 50
Nevada		30.25	277,333 40
Sierra		2.15	19,711 30
Yuba County		15.87	145,496 90
Sutter "		10.00	91,680 46
Butte "		45.00	412,562 10
Tehama "		40.54	371,672 60
Shasta "		18.80	172,359 30
Stanislaus "		22.63	207,472 90
Merced "		36.75	336,925 70
Fresno "		61.06	559,800 90
Tulare "		12.65	115,675 79
Totals,		604.00	$5,537,500 00
Total value of road-way, bed rails and franchise			$3,624,000 00
Total value of rolling-stock			1,913,500 00
Total value,			5,537,500 00
Gross earnings on 2,319 miles			17,153,163 16
" " per mile			
Deduct 610+180 miles=790 miles			5,843,472 00
Proportion of earnings in the State, 1529 miles.			
			$11,309,691 16

(Endorsed:) Filed 19th February, A. D. 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

48 *Undertaking on restraining order.*

In the circuit court of the United States of the ninth judicial district in and for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHAS. E. PALMER, TAX COLLECTOR OF THE county of Alameda, State of California, and The Central Pacific Railroad Company, defendants.

Whereas the complainant has commenced a suit in the above-entitled court against the above-named defendants, and has applied for a temporary restraining order in said suit against the said defendants, enjoining and restraining them from the commission of certain acts, as in the bill of complaint filed in the said suit is more particularly set forth and described:

Now, therefore, we, the undersigned, in consideration of the
49 premises, and of the issuing of said temporary retraining order, do jointly and severally undertake, in the sum of eleven thousand four hundred and thirty-three dollars, lawful money of the United States of America, and promise to the effect that in case said temporary restraining order shall issue the said complainant will pay to the said defendants, the parties enjoined, such damages, not ex-

ceeding the sum of eleven thousand four hundred and thirty-three dollars, as the said defendants may sustain by reason of the said re-restraining order, if the said circuit court finally decides that the said complainant was not entitled thereto.

Dated February 19th, A. D. 1881.

LLOYD TEVIS. [SEAL.]
W. H. WALLACE. [SEAL.]

UNITED STATES OF AMERICA,
District of California, ss:

Lloyd Tevis and William Henry Wallace, being duly sworn, each for himself deposes and says that he is a resident and householder
50 in said district, and is worth the sum of eleven thousand four hundred and thirty-three dollars exclusive of property exempt from execution and over and above all debts and liabilities.

LLOYD TEVIS.
W. H. WALLACE.

Subscribed and sworn to before me this 19th day of February, 1881.
[SEAL.] J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:)
Approved this 19th day of February, A. D. 1881.
JOS. F. O'BEIRNE.

Filed 19 February, A. D. 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

51 *Order to show cause and restraining order.*

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHAS. E. PALMER, TAX-COLLECTOR OF THE county of Alameda, State of California, and The Central Pacific Railroad Company, defendants.

Upon reading the bill of complaint and the affidavit of E. Black Ryan, filed in the above-entitled cause, on motion of McAllister & Bergin, solicitors for complainant, it is ordered that the defendants therein, on February 28, A. D. 1881, at eleven o'clock a. m. of that day, or as soon thereafter as counsel can be heard, at the court-room of said court, situate on the northeast corner of Sansome and Washington streets, in the city of San Francisco, district aforesaid, show
52 cause, if any there be, why an injunction should not issue in the above-entitled cause, restraining and enjoining the defendant The Central Pacific Railroad Company from paying the taxes, or any part of the taxes, in said bill of complaint mentioned, and restraining and enjoining the defendant Chas. E. Palmer, as tax-collector, from selling any of the property of the defendant corporation in said bill named and described, for non-payment of the taxes, or any part of any

of the taxes, in said bill of complaint mentioned, or in any wise enforcing payment thereof.

And the complainant herein having given satisfactory security, it is further ordered that in the mean time, and until the further order of the court, the defendant The Central Pacific Railroad Company do desist and refrain from paying the taxes, or any part of the taxes, in said bill of complaint mentioned, or in any wise enforcing payment thereof.

And the complainant herein having given satisfactory security, it is further ordered that in the mean time, and until the further
53 order of the court, the defendant The Central Pacific Railroad Company do desist and refrain from paying the taxes, or any part of the taxes, in said bill of complaint mentioned, out *out* of any of its corporate funds or assets, and that the defendant Chas. E. Palmer, as tax-collector of the county of Alameda, State of California, do desist and refrain from selling any property of the defendant The Central Pacific Railroad Company for non-payment of any of said taxes, and from in any wise enforcing or attempting to enforce payment from said corporation defendant of any part of said taxes.

Dated this 19th day of February, A. D. 1881.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed 19th February, A. D. 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

54 *Stipulation waiving certain requisites on filing demurrer.*

[Office of McAllister and Bergin, attorneys and counsellors at law, Nevada block. Harr. McAllister, T. I. Bergin.]

SAN FRANCISCO, *March* 4, 1881.

A. L. RHODES, Esq.:

DEAR SIR: We shall not insist upon order 31 in the Huntington case.

Respectfully,

McALLISTER & BERGIN.

(Endorsed:) Filed March 14, 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

55 *Affidavits of W. Dutton and J. L. King.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHAS. E. PALMER, TAX-COLLECTOR OF THE county of Alameda, State of California, and The Central Pacific Railroad Company, defendants.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Warren Dutton and James L. King, being first duly sworn, doth depose and say, each for himself, that he is, and during the year A. D. 1880 was, a member of the State board of equalization of the State of

California, and was present and took part, as a member of said board, at the making of the assessment upon the property of the Central Pacific Railroad Company, mentioned in the bill of complaint herein; that prior to the making of said assessment the said company was
56 aware the same was to be made, and appeared before said board by its agents and attorneys, and was fully heard in that behalf; that among others one E. Black Ryan appeared before said board prior to the making of said assessment as the agent of said company, and was fully heard in its behalf touching said assessment, and was afforded a full and ample opportunity to make any showing touching the same which he desired, and said Ryan did, then and prior to the making of said assessment, submit statements of the character and value of the property to said company belonging, and make a full showing to said board in behalf of said company touching the said proposed assessments, and was by said board afforded every facility and opportunity for doing all that he desired in the way of representing said company and acting in its behalf before said board concerning said assessment; and deponents further say that in making said assessment the said State board of equalization did not design to discriminate
57 against said corporation, the said Central Pacific Railroad Company, in favor of any other tax-payers in said State of California, or in any manner, and did not design or intend to assess said corporation at a higher rate than the individual taxpayers in said State were assessed for said year, nor did they in fact assess said corporation at a higher rate than said individual taxpayers, nor did said board design or intend to assess in effect or at all income taxes upon the income of said railroad company; said deponents further say that said assessment was not unequal or in any manner or degree in excess of the value of the property of natural persons in said State at the time of said assessment, nor did it appear to said board by any proof or otherwise, that said assessment was in any manner unequal or excessive, unfair or unjust; said deponents further say that said board of equalization was disposed and intended at all times to assess the property of
58 said company at its actual cost value and in the same manner as the property of the individual taxpayers in said State was assessed and equalized for the current year, and not otherwise; said deponents further say that said board did not by said assessment assess the property of said corporation one-third or any part of the amount of said assessment over and above what the same or any property of individual taxpayers of said State was assessed, but to the contrary said deponents say that said assessment was in every respect fair and just, and in making the same, the said board acted fairly and impartially, and with the sole aim to assess the property of said company in the same manner and at the same rate and upon the same basis of value as the property of individual taxpayers of the State was assessed for said year.

WARREN DUTTON.
JAMES L. KING.

Subscribed and sworn to before me this 28th day of March, A. D. 1881.

EDW'D CHATTIN,
Notary Public.

(Endorsed:) Filed May 2, 1881. L. S. B. Sawyer, clerk.

59 At a stated term, to wit, the July term, A. D. 1881, of the cir-

cuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Wednesday, the 17th day of August, in the year of our Lord one thousand eight hundred and eighty-one.

Present, the honorable Lorenzo Sawyer, circuit judge.

Order allowing appeal.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHAS. E. PALMER, &C., ET AL., DEFENDANTS. } No. 2510. In equity.

At this day on motion of T. I. Bergin, esq., of counsel for complainant, it is ordered that an appeal from the decision and decree in the above-entitled cause made and entered on the 15th day of August,
60 1881, to the Supreme Court of the United States, be, and the same is hereby, allowed upon complainant's filing a bond on appeal in the sum of seven hundred dollars, and that a certified transcript of the record and of all the proceedings be forthwith transmitted to the Supreme Court of the United States.

61 *Bond on appeal.*

In the Supreme Court of the United States.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHAS. E. PALMER, TAX-COLLECTOR OF THE county of Alameda, and The Central Pacific Railroad Company, defendants. } No. 2510.

Know all men by these presents, that we, Herman F. Morken and William W. Dodge, of the city and county of San Francisco, State of California, are held and firmly bound unto Chas. E. Palmer, tax-collector of the county of Alameda, and The Central Pacific Railroad Company, in the sum of seven hundred dollars, to be paid to the said Chas. E. Palmer and to the said The Central Pacific Railroad Company or their successors; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these pres-
62 ents, sealed with our seals, dated this seventeenth day of August, A. D. 1881.

Whereas the above-named complainant Collis P. Huntington has prosecuted an appeal to the Supreme Court of the United States of America to reverse the decree entered in the above-entitled action by the circuit court of the United States for the ninth circuit in and for the district of California, on the 15th day of August, A. D. 1881:

Now, therefore, the condition of this obligation is such that if the above-named Collis P. Huntington in said above-entitled action shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HERMAN F. MORKEN. [SEAL.]
WILLIAM W. DODGE. [SEAL.]

Signed, sealed and delivered in presence of—
L. S. B. SAWYER.

UNITED STATES OF AMERICA,
District of Califovnia, ss:

Herman F. Morken and William W. Dodge being duly sworn,
63 each for himself deposes and says that he is a householder and freeholder, and is worth the sum of seven hundred dollars exclusive of property exempt from execution and over and above all his just debts and liabilities.

HERMAN F. MORKEN.
WILLIAM W. DODGE.

Subscribed and sworn to before me this 17th day of August, A. D. 1881.

L. S. B. SAWYER,
Com'r U. S. Circuit Court, Dist. Cal.

(Endorsed:)
Approved this 17th day of August, 1881. Filed August 17, 1881. L. S. B. Sawyer, clerk.

Form and sufficiency of bond approved.
(Signed) LORENZO SAWYER,
Circuit Judge.

AUG. 17, 1881.

64 In the circuit court of the United States of the ninth judicial circuit in & for the district of California.

COLLIS P. HUNTINGTON, COMPLAINANT,
vs.
CHARLES E. PALMER, TAX-COLLECTOR OF the county of Alameda, and The Central Pacific Railroad Company, defendants.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify that the foregoing written pages, numbered from 1 to 63, to be a full, true, and correct copy of the record and of all proceedings in the above and therein-entitled cause, and that the same together constitutes the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said circuit court this first day of September, A. D. 1881.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsement on cover:) No. 1127. Collis P. Huntington, appellant, vs. Charles E. Palmer, tax-collector of the county of Alameda, and The Central Pacific Railroad Company. California C. C. U. S. Filed 2d November, 1881.

REC. 1127—3

No. .....

FILED
NOV 26 1881
JAMES H. MCKINSTRY

IN THE

Supreme Court

OF THE

UNITED STATES.

C. P. HUNTINGTON,

Appellant.

vs.

CHAS. E. PALMER et al,

Appellees.

Brief for Appellant.

HALL McALLISTER,

Counsel for Complainant.

& Appellant

Filed ..... *1881.*

..... *Clerk.*

By .....

Deputy Clerk.

H. S. CROCKER & CO., STATIONERS AND PRINTERS, S. F.

In the Supreme Court

OF THE

UNITED STATES.

C. P. HUNTINGTON,
Appellant,

vs.

CHAS. E. PALMER *et al.*,
Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

This is a suit in equity instituted by the complainant as a stockholder of the defendant corporation for himself and in behalf of all other stockholders who may come in and contribute to the prosecution of the suit to enjoin and restrain the defendant corporation from wasting and misapplying corporate funds of the corporation. The threatened misapplication of the corporate funds sought to be enjoined is an invalid tax based upon an assessment set forth in the bill, the invalidity of which is apparent upon the grounds therein stated.

Before the hearing in the Court below the bill was amended, and the demurrer to the amended bill was argued and submitted and sustained by the Court, and thereupon judgment final was entered in favor of the defendants. The judgment of the Court below proceeded upon the question of remedy, and we shall therefore proceed to discuss that question before entering upon the consideration of the invalidity of the tax itself.

I.

Equity Jurisdiction of Federal Courts.

The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery of England possesses, and is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union.

The absence of a complete and adequate remedy at law is the only test of equity jurisdiction and the application of this principle to a particular case must depend on the character of the case as disclosed in the pleadings. It is not enough that there is a remedy at law. It must be a plain or an adequate one; or in other words, practical and efficient to the ends of justice.

Payne vs. *Hook*, 7 Wall., 430.
Suydam vs. *Broadnax*, 14 Peter, 67.
Union Bank of Tenn. vs. *Jolly's Administrators*, 18 Howard, (U. S.) 506.
Railway Co. vs. *Whitton*, 13 Wall. (U. S.) 286.
Gaines vs. *Fuentes*, 2 Otto, 20.

II

The assets of a corporation are a trust fund that Courts of equity will protect for the benefit of its creditors and stockholders.

Wood vs. *Dummer*, 3 Mass., 308.
R. R. Co. vs. *Howard*, 7 Wall., 410.
Sawyer vs. *Hoag*, 17 Wall., 620.
Upton vs. *Tribilcock*, 1 Otto, 47.
Bradley vs. *Farwell*, Holmes, 440.

III.

In a Court of law a stockholder has no standing to assert any right or title to corporate property or any interest therein.

In the language of Chief Justice Shaw, in *Smith* vs. *Hurd*, 12 Met., 385 :

"The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action ; could not collect a debt, or discharge a claim, or release damage arising from any default; simply because, they are not legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body,

and exercise such powers as the organization of the institution gives them. Stockholders in banks have a separate right to dividends, when declared, and to a distributive share of the capital stock, if any remains, when the charter of the bank is at an end and its debts paid * * * * The injury done to the capital stock by wasting, impairing and diminishing its value, is not, in the first instance, nor necessarily, a damage to the stockholders. All sums which could in any form, be recovered on that ground, would be assets of the corporation, and when collected and received by directors, receivers, or any other persons entitled to receive the same, they would be held in trust, first, to to redeem the bills and pay the debts of the bank; and it would be only after these debts were paid, and in case any surplus should remain, that the stockholders would be entitled to receive anything. It is, therefore, an indirect, contingent and subordinate interest, which each stockholder has, in the damages so to be recovered against directors."

The principles asserted in this case have been reaffirmed in —

Abbott vs. *Merriam*, 8 Cush., 590.
Peabody vs. *Flint*, 6 Allen, 56.
Graves vs. *Gouge*, 16 Abbott, N. S., 378.
S. C., 69, New York, 154.
Allen vs. *Curtis*, 26 Conn., 456.
Gorham vs. *Gilson*, 28 Cal., 484.
Gashwiler vs *Willis*, 33 Cal., 19.

IV.

While in a Court of law a stockholder has no standing to assert any right or title to corporate property, or any interest therein, yet in a Court of equity he will be protected in his interest therein against all waste, dissipation or invasion, however small his individual interest may be.

Robinson vs. *Smith*, 3 Paige Ch., 230.
Dodge vs. *Woolsey*, 18 How. (U. S.) 331.
Bronson vs. *La Cross R. R. Co.*, 2 Wall., 302.
Memphis vs. *Dean*, 8 Wall., 73.
Zabriskie vs. *Cleveland, Columbus, etc., R. R. Co.*, 23 How. (U. S.) 395.
Davenport vs. *Dows*, 18 Wall., 627.
Morgan vs. *R. R. Co.*, 1 Woods, 18.

These cases are based upon the principle that it is the peculiar province of a Court of equity to protect a trust fund. (Morgan vs. Beloit City, 7 Wall., 619.)

As observed by the Court in *Oelrichs* vs. *Spain*, 15 Wall., 228: "Upon looking into the record it is clear to out minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. If the injunction bonds were sued upon at law, and judgments recovered, a proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all

concerned in one litigation. *Besides there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity.*"

V.

Prevention of a multiplicity of suits is a well recognized head of equity jurisdiction, upon which the right to relief is equally tenable.

Carroll vs. *Safford*, 3 How. (U. S.) 463.
Dows vs. *City of Chicago*, 11 Wall., 110–112.
Cummings vs. *National Bank*, 11 Otto, 157.
National Exchange Bank vs. *Hills*, 5 Federal Reporter, 253.

In this case what is the remedy at law? In *San Francisco* vs. *Ford*, 53 Cal. 198, the Court held that taxes paid to a tax collector, whether under protest or not, must be paid by him into the treasury.

In *Herzo* vs. *San Francisco*, 33 Cal., 142, the Court speaking of a case where the purchaser of city slip property was suing the city for recovery of the purchase money that he had paid into the city coffers, say:

"The only authority it was ever pretended the city had to effect the sale of the lots is found in Ordinance No. 481; and she had no authority to receive anything on account of the purchase money for the lots unless a sale was made according to law—in other words, her authority to receive the money depended upon

her capacity to make the sale, coupled with a sale in fact—and it being found that the sale was void for want of authority to make it, it necessarily follows that she was destitute of authority to receive the purchase money. In this respect the city is in the attitude in which she would have stood, had there been no attempt to pass an ordinance to provide for the sale of the lots. The receipt of the money by the Secretary of the Committee on Land Claims was not the act of the city, for he had no power to represent the city in that behalf. The proceedings of the Land Committee and their Secretary in receiving the money paid as the purchase money, as well as the acts of the Treasurer in receiving the money from the Secretary and placing it in the treasury, were only the unauthorized acts of assumed agents and did not of themselves bind the city."

The Court held, accordingly, that the purchaser could not recover his money from the city.

Under the laws of California there is no provision for refunding taxes illegally paid. When paid, whether legally or illegally, they must be paid into the public treasury.

In this instance the tax was not upon complainant Huntington, or upon any of his property; nor was there any means whereby he could pay what might be his just proportion of the corporate tax. He had no legal right to pay the tax, nor was there any obligation upon him to do so. No principle of law or of equity required him to pay *all the taxes upon the corporate property of the corporation in order to protect his own interests*

against dereliction of duty on the part of the Board of Directors. Had he paid the taxes he could not have recovered them in an action at law. Where, then, is his plain, speedy and adequate remedy? Is it so plain, speedy and adequate as to toll the ordinary right of relief of a stockholder in a Court of equity?

As to recovery of money paid under protest, *vide De Baker* vs. *Carrillo*, 52 Cal., 473.

In the case of *Dodge* vs. *Woolsey*, 18 How., 331, this Court did not so think; and in *Dows* vs. *The City of Chicago*, 11 Wall., 112, the Court say: "*The cross-bill filed by the bank present different features. That institution insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the State, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders; and were it an original bill, the jurisdiction of the Court might be sustained on that ground. But as a cross-bill it must follow the fate of the original bill.*"

The case of *Forbes* vs. *Gracey*, 4 Otto, 767, is a recent and direct decision of this Court upon this precise point. In that case, Charles Forbes, a stockholder in the Consolidated Virginia Mining Company, instituted suit in the Circuit Court of the District of Nevada, to enjoin payment of a tax upon the bullion and ores mined in the State of Nevada. The bill in that case, as in the case at bar, was the bill of a stockholder. A demurrer

was interposed thereto, and it was fully argued; and upon consideration, the right of the complainant to the remedy prayed was distinctly affirmed by the learned Judge of the Circuit Court but the decision of the Court was adverse to the complainant upon the validity of the tax there involved. The case was brought to this Court. In both Courts the question of remedy was distinctly and elaborately argued by counsel, and the authorities bearing upon the points called to the attention of the Court. This Court affirmed the decision of the Circuit Court, thereby maintaining the jurisdiction of the Circuit Court to entertain such a bill.

It is an acknowledge principle of equity jurisprudence, that when a Court of chancery has once acquired jurisdiction of a case for one purpose, it will retain it for all purposes, and do complete justice between all the parties.

Real Estate Savings Institute vs. *Colonine*, 63 Mo., 295.

Nor is there anything in the decisions of the courts of the State of California to preclude the right to maintain the present bill.

The leading case in California is *Savings and Loan Society* vs. *Austin*, 46 Cal., 415, in which the Court say, (p. 488): "In these cases there has been no sale of the property to satisfy the delinquent tax, and the averment is substantially that the title of the plaintiffs to their real estate has been clouded by the assessment and supposed lien for the taxes claimed to be due and remaining

unpaid; that the tax collector has advertised the property to be sold for the satisfaction of the tax and will proceed with the sale unless restrained; that if the property is sold there will be numerous purchasers against whom the plaintiffs may be compelled to bring a multiplicity of actions to recover it back." After quoting the language of Justice Field in the case of *Dows* vs. *City of Chicago*, 11 Wall., 110, the learned Judge proceeds: "This, we think is a correct statement of the rule as established by the weight of authority, and it only remains for us to inquire whether the plaintiffs have brought themselves within it. There is no averment that irreparable damage will ensue if the sale is allowed to proceed; but in the case of the Savings and Loan Society, they allege that if the defendant is permitted to sell, 'it will cause plaintiffs to have divers litigations aud suits against the various purchasers at such sale, which will be attended with great expense, harassment and delay to remove the cloud thereby cast upon said real estate, and will prevent plaintiffs from selling said real estate or any part thereof at cash value.'

"In the complaint in the case of Doe there is no averment of this character, but only an allegation, that by the Political Code the tax purporting to have been assessed 'is attempted to be made a lien' on real and personal property of the plaintiffs. This averment is clearly insufficient to support the injunction, as it fails to aver or show that the plaintiffs will suffer any irreparable injury, or that any cloud has been imposed upon their title, or that the injunction will prevent a multiplicity

of suits. Nor are the averments in the case of the Savings and Loan Society sufficient to authorize an injunction. The allegation that if the sale is allowed to proceed they may be involved in litigation with purchasers is a mere speculation as to probabilities which may or may not occur. *Non constat*, that a purchaser will be found, or that there will be more than one, or that the purchaser will claim the benefit of the purchase, or that he will accept, or that the collector will ever execute a deed for the property. If averments of this description are sufficient to authorize an injunction, the levying of the assessment, and every act performed by the assessor, might be arrested in the same way, on the ground that they were the initiatory steps of the proceeding which might culminate in a sale and Sheriff's deed, and thereby ultimately produce litigation, and create a cloud upon the title. Probabilities of this kind are too remote to justify the Court in interposing by an injunction to arrest the collection of the public revenue."

The case of *Houghton* vs. *Austin*, 47 Cal., 651, and *Central Pacific R. R. Co.* vs. *Corcoran*, 48 Cal., 65, simply follow the doctrine announced in *The Savings and Loan Society* vs. *Austin*. All these cases proceed upon the doctrine as laid down in *Dows* vs. *Chicago*, and do not pretend to overrule the principles there announced. In truth, there was no occasion to rule otherwise.

Be that as it may, however, we have already cited to the Court the decisions of this Court, announcing its established doctrine, that the

equity jurisdiction of the Federal Courts is not dependent upon or measured by the statute or common law jurisprudence of the different States, or in the language of this Court, in *Payne* vs. *Hook*, 7 Wall., 430, "The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union. * * * * The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. 'It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity.'"

Nor did the learned Judges of the Circuit Court dispose of this case upon any principle that relief could not be had in equity. They decided the case upon the authority of the State Railroad Tax Cases, 2 Otto, 576, and *National Bank* vs. *Kimball*, 13 Otto, 732, deeming that those cases had authoritatively established the rule that in no case could relief be had against an invalid tax where a tender of payment had not been made of some part or portion of it, however unfounded and illegal the entire tax might be. With all deference to the learned Judges, we respectfully submit that those cases do not establish the doctrine claimed. The great stress of argument in

the State Railroad Tax Cases was not to show that the tax was absolutely void, but that the machinery provided for assessment was illegal and unequal. The Court observed (page 611): "There is no claim that *the rate* of taxation levied by a municipal corporation on the assessed value of railroad property within its limits is greater than on other property, nor is it asserted that the valuation of that part of the property which the statute regards as strictly local, namely real estate not a part of the track, and tools and implements used exclusively within the locality, has been assessed on any other principle than that which is applied to the property of individuals; but the contention is, that the rule of treating the road, its rolling stock and franchises, *as a unit, and assessing it as a whole*, on which each municipality levies its tax according to the length of the road within its limits, violates the principles of this section. We have already discussed this question, and we are of opinion the taxes assessed upon that rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property." And after adverting to the authorities upon the point, the Court conclude: "In the examination which we have made of these cases we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a Court of equity. *There is no fraud proved, if alleged. There is no violation of the Constitution either in the statute or in its administration by the*

Board of Equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the Constitution violated." And speaking upon the subject of tender, say: "They must first pay *what is conceded to be due or what can be seen to be due on the face of the bill or be shown by affidavits, whether conceded or not,* before the preliminary injunction should be granted. *The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested.*" Thus showing that the remarks of the Court were addressed to cases where the legal and illegal parts of the taxes were separable and severable, The same remarks apply to the Kimball case. There is nothing in either of those cases to give countenance to the doctrine that an aggrieved party can have no relief in a Court of equity against a confessedly illegal tax without having first paid it.

In the well considered case of *Marsh* vs. *The Supervisors of Clark County*, 42 Wisconsin, 519, speaking upon the point, the Court say: "The learned counsel also pressed upon us the rule that he who seeks equity should do equity; and that the appellants should pay their fair taxes, before they could have relief against the tax sale. And he insisted that the appellants could not have relief without showing injustice done to them by the tax for which the deed was about to issue. We should not, of course, question either of these positions in a case in which they could properly arise.

The difficulty of applying either rule in the present case is obvious, and has been already indicated. The trouble is, that there is no tax, therefore no apportionment of the appellants' share of a tax. It is thus impossible for the appellants or for the Court to say what would be their proportion of a valid tax. And it is surely sufficient injury, and sufficiently inequitable to support this suit, that a tax deed of appellants' land will issue, unless they will pray a sum as a tax for which no tax has been assessed. An illegal tax is none the less illegal because it may happen to be the same, or even less than a legal tax might have been. When, as in this case, the whole assessment is a fraud upon the law and an invasion of the Constitution, every exaction of a tax purporting to be levied upon it is a wrong; an unlawful exaction of money, not legally or equitably payable, under false color of a legal proceeding."

In *Plumer* vs. *The Board of Supervisors of Marathon County*, 46 Wisconsin, 181, speaking upon the same subject, the Court say: "Tender has no proper application to unliquidated damages. It may be that, in some cases, the Legislature might authorize or require tender to cover unliquidated amounts; but the Legislature cannot require a party aggrieved by an apparent tax proceeding, when no valid tax has been levied, to make a tender or offer at his peril, of his just share of tax, as a condition of relief; to purchase his remedy against the oppression of a tax where the ground work on which the taxing power rests

is wanting to support any tax. It is the duty of persons subject to taxation to pay their just taxes when liquidated and levied, but they are not bound to tax themselves. It is the duty of the public to liquidate each person's just share of every tax, by constitutional exercise of taxing power, and no statute can impose the burden upon a taxpayer of liquidating his own tax. The section requires a party seeking relief against a tax where the ground work is wanting—where in law no tax has been liquidated or levied—to guess at the amount which would have been his share of a valid tax, had one been liquidated and levied; or to make an assessment of his taxing district, and charge himself with his just share of tax, at his own peril; or be denied his remedy against the unconstitutional exercise of the taxing power. No such burden can be constitutionally laid upon him as a condition of his remedy, as the price of justice."

L. & R. R. Co. vs. *Gaines*, 3 Federal Reporter, 282.

1 High on Injunction, sections 497, 498.

To require payment or tender of that which is no tax—which is founded upon a disregard of the Constitution, would seem to be a doctrine wholly at war with all received principles of law and equity. Assuredly, a Court of equity should never ask as a condition of the right to relief that a party should violate and disregard the law, and assuredly, there was no obligation to respect what is merely the form, but in fact not the law, in entire contravention of the principles of the

Constitution. The Constitution is the supreme law. In its presence all legislative enactments in contravention of its provisions must be disregarded, and to its paramount behests allegiance must be accorded. No right can be founded in violation of its principles or its policy, nor can a compliance with a disregard of them be made a condition to the right of relief against such unconstitutional enactments.

Thus much upon the question of remedy.

VI.

UPON THE MERITS.

Sufficiency of Titles of the Statutes Involved:

The title of the Act of March 22d, 1880, is in these words: "An Act to amend sections 3607, 3617, 3627, 3628, 3629, 3630, 3634, 3640, 3643, 3650, 3651, 3652, 3663, 3675, 3678, 3679, 3717, 3730, 3752, 3756, 3839, 3861, and to repeal sections 3680 and 3887 of an Act entitled 'An Act to establish a Political Code,' approved March twelfth, eighteen hundred and seventy-two, relating to revenue, and to add two new sections, numbered 3664 and 3665,' (Amendments to Codes, 1880, page 5;) and the title of the Act of April 16th, 1880, is in these words, "An Act to amend section 3713 of the Political Code."

Section 24, Article IV., of the Constitution, provides:

"Every act shall embrace one subject, which subject shall be expressed in its title, but if any

subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title, etc."

In *Rader* vs. *Township of Union*, 39 N. J. L., 515, Chief-Justice Beasley, speaking upon this point, says: "But the other point on this same subject raised by counsel, has a wider scope, and therefore, is of a more serious character, such point being, that the title of this statute does not truly express the object of the legislation which it embodies.

"After careful consideration of this subject, I have concluded that this exception is well taken, for I have failed to discover what effect is to be given to this constitutional provision, if it is not, in this case to have the effect of annulling this law. It has been already said that the purpose of the provision requiring the object of the proposed law to be expressed in its title is to give notice of and publicity to the proposed legislation, and such purpose would be thoroughly frustrated, if a title should be sanctioned having a scope sufficiently wide to embrace and to validate the present Act. The title of this Act is, 'An Act in relation to streets in Union Township, Union County,' and it will, on a moment's thought, be perceived how general such an allusion to the legislative purpose is. It is true that it may be difficult to indicate by a formula, how specialized the title of a statute must be; but it is not difficult to conclude that it must mean something in the way of being a notice of what is doing. Unless it does this, it can

answer no useful end. It is not enough that it embraces the legislative purpose—it must express it, and where the language is too general, it will accomplish the former, but not the latter. Thus a law entitled 'An Act for a certain purpose,' would embrace any subject, would express none, and, consequently it would not stand the constitutional test. And so, a law entitled 'An Act in relation to silk goods,' would not indicate in the faintest outline, a purpose to incorporate a body for the manufacture of such fabrics; such titles would be idle and inefficacious for every purpose. And yet the latter example of a nugatory title is not unlike the one prefixed to the Act under consideration. It is described as being in relation to streets in Union Township, but its immediate purpose is to create a corporation to take charge of such streets. These streets before the passage of such law were in the hands of the officers of the township; the new scheme was to supersede such supervision and to transfer it to a corporate board organized for that purpose. This was an important change, most materially affecting the property and personal rights of the inhabitants of the district embraced in the law; and yet it is certain the title of this statute would not have conveyed to such persons any intelligible intimation of the project in contemplation. This statute relates to the streets only, because the organization it establishes is to have control of them, but the object of the Act is the establishment of such organization. Such subject not being expressed in the title, I think the entire Act is void."

Durkee vs. *City of Janesville*, 26 Wis., 700.
Gaskin vs. *Meek*, 42 N. Y., 188.
People vs. *Commissioners of Highways*, 63 Barb., 72.
People vs. *Hills*, 35 N. Y., 350.
People vs. *O'Brien*, 38 N. Y., 195.
People vs. *Supervisors*, 43 N. Y., 22.
State vs. *Silver*, 9 Nev., 231.
The State vs. *Bankers, etc.*, 23 Kans., 500.
People vs. *Institute of Protestant Deaconesses*, 71 Ill., 233.
Green Castle Southern Turnpike Co. vs. *The State*, 28 Ind., 384,
Falconer vs. *Robinson*, 46 Ala., 337.
People vs. *Parks*, Supreme Court of Cal. 8th Pacific Coast Law Journal, 219.

These authorities attest the correctness of the views of Chief Justice Beasley. Take the title of the first Act referred to. What information does it give of the subject of which it treats?

"An Act to amend section 3713 of the Poltical Code," certainly does not express the subject that may be embraced in the amendment. The purpose and the policy of the law is that the title express the subject of the law. There must be a just relation between the subject of the Act and its expression in the title. It is true that Courts will not indulge captious criticism, where the title, by a fair and reasonable construction, may be held to apply to and express the subject of the Act.. But the mandate of the Constitution is peremptory that the subject of the act must be expressed in its title, and the purpose and policy of the requirement as

explained in these decisions, abundantly show that the title to the Act in question is wholly insufficient. Accordingly, in the case of *Leonard* vs. *January*, decided by our Supreme Court this year, the Court held the County Government Act, so called, to be found on page 93, of the amendments to the Political Code of 1880, unconstitutional, for insufficiency of the title. The subject of this statute is to authorize the State Board of Equalization to fix the rate of taxation for the fiscal year in question. Does the title of the Act in the remotest degree furnish any information of the nature of this subject of the Act? Could a more ingenious method be devised to conceal a latent purpose, than by omitting to express, as required by the Constitution itself, the subject of the Act, and instead of so doing, refer to some other legislation or source of information for that which should find expression in the title of the Act itself? The constitutional requirement in question was designed not merely to inform the public at large of what may be transpiring in the halls of legislation, but is equally designed to guard improvident members foom being entrapped into hasty and injudicious legislation. By adhering to the constitutional requirement, a ready means of protection will ever be furnished even to the most heedless of legislators; whereas, by departing from it, the most wary may be thrown off their guard. The question, however, is not one merely of the relative merits of two systems. There are no two systems. There is but the plain, simple, mandatory requirement of the Constitution that every

Act shall embrace but one subject, which subject shall be expressed in its title; and it is no less imperative upon the legislature to observe this constitutional requirement than any other constitutional provision embodied in the organic law of the State.

In reference to the second Act of the Legislature here, in question above referred to, we may use the language of the Supreme Court in the case of *Earle* vs. *The Board of Education*, 55 Cal., 492:

"But the Traylor Act is in no sense an amendment to the Political Code. It is entitled 'An Act to add a new section to the Political Code, to be known as section 1518,' etc., and its first section is, 'a new section is hereby added to said Political Code, to be known as and numbered 1618, and to read as follows, etc. * * *'

"The new section, which is a subsequent Act, declares that in consolidated cities and counties of a certain population, the salaries of teachers shall be certain sums respectively. The subsequent Act, if anything, is, to the extent it goes, a repeal by implication, of the seventh provision of sectinn 1617, but in no sense is it an amendment. If an amendment, what does it amend? The Political Code or some particular section of it? If treated as an amendment at all it is in direct conflict with section 24 of Article IX of the Constitution, which declares that no law shall be revised or amended by reference to its title; but in such case the Act revised or section amended shall be re-enacted and published at length as revised or amended."

"There is no pretense here that the law, whatever it is supposed to have been, amended by the Traylor Act, was re-enacted and published at length as amended, as is expressly required by the Constitution. If this law is to be upheld as an amendment, it seems to us it would be opening the door to the accomplishment by indirection, of many of the evils it was manifestly intended by the framers of the Constitution directly to prevent, and thus wipe out some of its most salutary provisions."

What is there in the title of the Act of March 22, 1880, to indicate the subject of its enactment? It does not itself profess to relate to revenue. It is simply descriptive of the particular sections of the Political Code therein referred to. What is there in the title to indicate the subject of the two new sections?

Nothing whatever. Obviously to add two new sections to the Political Code can afford no index of the legislative purpose. The Political Code treats of all the political relations of the State, the counties of the State, and its different political affairs; from the organization of the Legislature down to the pettiest school district in the State; from the functions of the Governor down to a notary public, and all the various subjects covered by that Code.

To say therefore that a statute "adding two new sections to the Political Code," furnishes any expression of the subject of those new sections is simply to disregard the known use of language and set at naught the letter as well as the policy

of the constitutional provision in question. If these views be correct, it follows that these two statutes are unconstitutional and void.

VII.

The two new sections of Act of March 22, 1880.

The two new sections added to the Act of March 22, 1880, are the material and important ones in this case, prescribing as they do the manner of assessing railroads.

It will be observed in the first place, that section 3664, in addition to requiring a return of the other matters specified, provides that the return prescribed shall show the amounts of the *annual gross earnings* of the entire railway, and the proportionate *annual gross earnings* of the same in this State as nearly as practicable, and it further provides that the assessment shall be made upon the entire railway within the State, and shall include the *right* of way, road-bed, *track*, *bridges*, *culverts* and rolling stock.

It will thus be seen that the earnings of the road are intended to be made a gauge of the assessable value of the property of the company, and that the assessment is required to embrace track, bridges and culverts.

With reference to the return of the gross earnings we submit that, under the Constitution, it can have no proper place in the law. The same rule of law must be applied to railroads that is applied to all other taxpayers. Railroads cannot be singled out for taxation in proportion to their

gross earnings, while the individual taxpayers are not thus taxed.

It involves a discrimination wholly inadmissible under the Constitution of the United States as well as of this State.

The 14th Amendment to the Constitution of the United States provides that no State shall deny to any person within its jurisdiction the equal protection of the laws, and section 1977 of the Revised Statutes of the United States provides that all persons within the jurisdiction of the United States shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind *and no other*.

Section 21 of Article I, of the Constitution of California, provides, "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

In *Corfield* vs. *Coryell*, 4 Wash., 381, in expounding the meaning of the constitutional clause that citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, Mr. Justice Washington says that, among other things, it includes "an exemption from higher taxes or imposts than are paid by the other citizens of the State."

Oliver vs. *Washington Mills*, 11 Allen, 280.
Ah Kow vs. *Nunan*, 5 Sawyer, 562.
Bank of State vs. *Cooper*, 2 Yerg., 599
Van Zant vs. *Waddell*, Ib., 260.
Wally's Heirs vs. *Kennedy*, Ib., 554.

It is evident therefore, that the Legislature has no constitutional power to apply one rule of taxation to railroads and another rule of taxation to individual taxpayers.

What has the gross earnings of the company to do with the taxable value of its property? If required of railroads, why not equally required of individuals? Is it in effect anything more or less than the exaction of an income tax which the Legislature has not yet seen fit to authorize? True, the Legislature may impose an income tax; but when it does so it must apply equally to all persons within the State, whether real or corporate bodies. The lucrative character of the business of a company can legitimately reflect no light upon the taxable value of its property.

In *Albany and Schenectady R. R. Co.* vs. *Osborn*, 12 Barb., 225, the Court say:

"Under these provisions of the statute, it seems to me the duty of the Assessors is a very plain one. They are simply to ascertain the value of the land, and of the erections or fixtures thereon, irrespective of the consideration whether the road is well or ill managed, or whether it is profitable to the stockholders or otherwise. Such property is to be appraised in the same manner as the adjacent lands belonging to individuals, and without reference to other parts of the railway. In estimating the value of an adjacent farm, it certainly would not be permitted to take into consideration the skill with which it was managed, nor the means by which high prices were obtained for the

produce. These would change with every occupant, and perhaps with every year. If such a course were proper, two adjoining farms, of equal extent and fertility, and equally distant from market, might be very unequally taxed in the same town, because the one was occupied by a poor farmer, and yielded no profit, and because the other was managed with an amply rewarded skill and industry. Such a course of proceeding would levy an income tax, or at least a tax upon skill and thrift, rather than upon the value of the land itself."

Huntington vs. *Central Pacific Railroad Co.*, 2 Sawyer, 509.
Cummings vs. *National Bank*, 11 Otto, 158.
Pelton vs. *National Bank*, 11 Otto, 145.
People vs. *Weaver*, 10 Otto, 539.
Chamberlain vs. *Cleveland*, 34 Ohio State, 560; 8 Mich., 294 to 301.

Under the guise of general legislation, the Legislature cannot single out railroad corporations for taxation upon income. If income taxes are to be imposed they must be imposed upon all alike.

Ex parte Westfield, 55 Cal., 550.

With respect to the assessment of tracks, bridges and culverts, it is evident that the Legislature has transcended its power.

Under section 10, Article XIII, of the Constitution, all property except the franchise, roadway, road-bed, rails and rolling stock of railroads

operated in more than one county, must be assessed in the city and county, town, township or district in which it is situated. The jurisdiction of the Board under the Constitution can only extend to railroads operating in more than one county. The only property that it can assess of such corporations, are the franchise, railway, road-bed, rails and rolling stock.

True, tracks, bridges and culverts may or may not constitute a portion of the road-bed, rails and rolling stock of a railroad company; but as separate, several and distinct subjects of taxation, they are not withn the jurisdiction of the State Board of Equalization, and the section of the statute in this respect is manifestly unconstitutional. Nor can it be claimed that disregarding these various provisions of the statute, under section 10, Article XIII, of the Constitution, the State Board of Equalization could legally make an assessment. That provision of the Constitution is not in itself self-executing. Under section 1, Article XIII, all property in the State shall be taxed in proportion to its value to be ascertained *as provided by law.*

This gives to the Legislature the manner of the ascertainment of the value of property for the purposes of taxation. The Legislature has assumed to act. It has undertaken to prescribe the manner of ascertaining the value of the property of railways. This, the Legislature had the power to do, had it pursued the method prescribed by the Constitution, for section 13, of Article XIII, expressly provides that the Legislature shall pass all laws necessary to carry out the provisions of

the article. When, therefore, the Legislature acts, if it follow the requirements of the Constitution, the State Board of Equalization is bound to obey its prescriptions, and when it has prescribed the manner of ascertaining the value of the property of railways the Court is bound to presume that the State Board has obeyed the prescriptions of the Legislature.

French vs. *Teschemacher*, 24 Cal., 538.
People vs. *Board of Education of Oakland*, 55 Cal., 131.
Ewing vs. *The Oro Mining Co.*, 5 *Pacific Coast Law Journal*, 524.

VIII.

Delegation of Power to Tax.

The Act of April 16, 1880, already referred to, is unconstitutional, in that it delegates to the State Board of Equalization the power to fix the rate of taxation.

The power to tax is one of the highest attributes of sovereignty—it is one of essentially legislative character. It is a power that the Legislature cannot abdicate nor delegate.

Constitution of California, Article I, section 22; Article XIII, section 6.

Unquestionably, when we consider this question, the power of taxation resides exclusively in the Legislature, and under section 22 of Article I it is mandatory upon the Legislature to exercise the power. Does or does not the Act of April 16, 1880, levy a tax? Is or is not the intervention of the exercise of discretion on the part of the

State Board of Equalization necessary under the Act, in order to determine the rate? True, the Legislature has undertaken to prescribe certain limits within which such discretion shall be exercised, but if, under the Constitution, such discretion can be exercised *only by the Legislature*, the limits within which it may be exercised are not material.

Once admit that the power may be delegated within prescribed limits, and the inability to delegate exercise of discretion immediately disappears.

Limits may readily be prescribed, practically abandoning the power of taxation into the hands of an irresponsible body, to whom the power was not confided under the Constitution.

In *Houghton* vs. *Austin*, 47 Cal., 650; *Wills* vs. *Austin*, 53 Cal., 159, it was held that the Legislature, under the former Constitution, could not delegate the power of taxation. The delegation was there adjudged to result from the power of the Board of State Equalization to take into account the sum necessary to cover delinquencies in collection.

In terms, the statute in question does accord this power to the State Board.

In section 3696 of the Political Code, they are permitted to allow 12 per cent. for delinquencies and cost of collection of taxes. If it may constitionally authorize a delegation of this power within these limits, it, of course, rests in the pleasure of the Legislature to prescribe what limits it pleases. In effect, these statutory provisions are but a simple evasion of the judgment

of the Supreme Court in *Houghton* vs. *Austin*. And this, too, after the people in their amended Constitution had distinctly inhibited such delegation by providing that all its provisions were mandatory and inhibitory.

It needs no prophet to predict how readily, when once such practice meets judicial sanction, the Legislature, for purposes best known to itself, will delegate this power within such limits as it shall see fit to prescribe.

The result will be that while the Legislature can not delegate the power of taxation as an abstraction, in fact and in effect it may commit the exercise of the power to any Board, officer or individual.

In this instance, exercise of the power has been committed to the State Board of Equalization, a body recognized under the Constitution. There is, however, no requirement of the Constitution when delegated, that it shall be delegated to that or to any other particular body, board or set of individuals. Once the right to delegate is admitted, it will rest entirely in the pleasure of the Legislature whether exercise of the power shall be delegated to that board or to any individual. We suppose that constitutional provisions are aimed at substances and not at mere shadows, and that its behests are not designed to be evaded by any such mere pitiful subterfuge. That the Board exercised in the instance in question, the discretion which under *Houghton* vs. *Austin* was held inadmissible, will readily appear from the report of

the Board for the year 1880, in which, on page 4, that body say:

"The assessed value of all property in the "State, in 1880, as reported on the 3d Monday in "August, by the County Auditors of the State, "was $666,183,320. Upon this sum, *after allow-* "*ing as provided in section 3696 of the Political* "*Code 12 per cent. for delinquencies in and cost of* "*collection of taxes, the Board fixed and deter-* "*mined the rate of the State tax to be* 59 cents on "each $100 of valuation."

In *The State* vs. *Hudson County, etc*, 37 N. J. Law, 19, Chief Justice Beasley, speaking on this subject, says: "But from what I have said, I "think it must be, upon careful consideration, con- "ceded that a power unchecked, except by the "obligations of fairness and a reasonable discre- "tion, is vested in this body of persons to distrib- "ute this tax according to its judgment of what is "just and right among the various townships of "this county. Holding this opinion, it seems to "me necessarily to result that this Act cannot be "enforced. The reason of this conclusion is, "that the Legislature has transferred to these "Commissioners a part of the law-making power. "A legislative Act of taxation in order to be legal "or effectual, must consist of something more "than a mere declaration that a certain sum of "money shall be raised out of the property within "a county. Itself must distribute the burthen. "This is as essential as the designation of the "amount to be raised; and not only the sum re-

"quired must be stated, and the property out of "which it is to be made designated, but also some "certain standard of assessment must be estab- "lished. No act of taxation can omit any of these "components. If the Legislature of this State "should ordain that a tax of a certain amount "should bə levied to be distributed among the "counties of the State in such proportions as the "Treasurer, in his discretion should direct, it "would not probably be denied by any one that "such an act would be entirely inoperative.

"The Act in question, according to the only "construction which seems to me admissible, is of "this character, and is, therefore, so clearly imper- "fect as an Act of taxation, that it must be ju- "dicially regarded as a nullity."

Ex parte Wall., 48 Cal., 313.
Hanlon vs. *Supervisors of Westchester*, 57 Barb. 397.
People vs. *Supervisors of Kings Co.*, 52 N. Y.. 566.

In *The People* vs. *Parks*, the Supreme Court of California, already referred to, speaking on this subject, Justice McKee observes:

"If a district has to be created over an area of "the State the Legislature must create it, and "establish its limits. If property within it will "be benefited by the improvement the Legis- "lature must determine it, and prescribe the "rules upon which taxation must be apportioned. "These are powers conferred upon it alone by "the Constitution, and *it cannot delegate it to any*

" *other department of the Government, or to any* " *agency of its appointment, because it would be* " *confiding to others that legislative discretion which* " *legislators are bound to exercise themselves, and* " *which they cannot delegate to any other man or* " *men to be exercised. Most of all, the Legislature* " *cannot delegate such powers to executive officers of* " *the State, because the Constitution has divided the* " *powers of government into three departments, the* " *Legislative, Executive and Judicial, and has* " *declared that no person charged with the exercise* " *of powers properly belonging to one of these de-* " *partments shall exercise any function pertaining* " *to any of the others, except it is expressly directed* " *or permitted by the Constitution. No such di-* " *rection or permission is contained in any part of* " *the Constitution.* I am, therefore, of the opinion " that the entire Act is unconstitutional, because " its provisions are made contingent upon the " judgment and discretion of the Board of Drain- " age Commissioners, and because, in making it " so contingent, the Legislature delegated to the " Board powers which are not in their nature " transferable (especially to executive officers of " the State), and which can be exercised by the " Legislature alone."

The Act, therefore, must be regarded as an unconstitutional delegation of power to the State Board of Equalization.

Nor is the force of this position at all affected or impaired from the immemorial usage in this State of the Board of Supervisors levying county taxes, for section 37, Article IV, of the old Constitution provided that:

" It shall be the duty of the Legislature to pro-
" vide for the organization of cities and incorpo-
" rated villages, and to restrict their power of
" taxation, assessment, borrowing money, con-
" tracting debts, and loaning their credits, so as to
" prevent abuses in assessment and in contracting
" debts by such municipal corporations." Section 9 of Article XI, of the same instrument, provided that each county, town, city, and incorporated village shall make provision for the support of its own officers, subject to such restrictions and regulations as the Legislature may prescribe. These constitutional provisions abundantly warrant the constitutional authority of the Board of Supervisors, under suitable legislation, to levy taxes. The same policy is preserved in the present Constitution, section 12, Article XI of which declares that :

" The Legislature shall have no power to im-
" pose taxes upon counties, cities, towns, or other
" municipal corporations, or upon the inhabitants
" or property thereof for county, city, town, or other
" municipal purposes, but may, by general laws,
" vest in the corporate authorities thereof the
" power to assess and collect taxes for such pur-
" poses."

And section 13 of the same Article distinctly states that :

" The Legislature shall not delegate to any
" special commission, private corporation, com-
" pany, association or individual any power to
" make, control, appropriate, supervise, or in any
" way interfere with any county, city, town or

" municipal improvement, money, property or " effects, whether held in trust or otherwise, or *to* " *levy taxes* or assessments, or perform any muni- " cipal functions whatever."

Here we find not only constitutional authority accorded to the Board of Supervisors, etc., under appropriate legislation, to levy taxes, but the distinct constitutional inhibition of the power to delegate to any special commission, private corporation, company, association or individual any power *to levy taxes*. While this inhibition upon delegation of power to levy taxes is absolute and unqualified, it may be claimed that, in view of the context and the peculiar subjects of which the article treats, the inhibition was only intended to apply to the levy of municipal taxes. This would be to stick in the dark. The correct principles of construction, in view of the constitutional principles and policy already adverted to, require that this inhibition shall be treated as co-extensive with its letter as well as its scope, purpose and policy, and they clearly forbid the delegation of the power to levy taxes of any kind, character or description.

IX.

Anti-Railroad Discrimination,

We have already referred the Court to the constitutional provisions and principles inhibiting discrimination against railroads, etc. We now beg to show their application in another connection. The assessment set out in the bill shows that the

actual cash value of the property assessed was $12,239,456, and it was assessed and taxed upon that amount. The amendment to the bill avers that during all this time the railroad company owed the Federal Government $27,000,000, and to third parties, $27,000,000, making a total of $54,000,000.

Under section 4, of Article XIII, natural persons thus indebted would not be liable to taxation upon this amount, but would only be subject to taxation upon the difference in value between the security and the debt. Railroads alone are excluded from this immunity. Nor is it any answer to say that this is a matter that concerns the creditor and not the railroad company. The inevitable effect of it is to greatly burthen railroad companies through the increased rate of interest and taxation it will cast upon them.

We submit that it was not competent to the State of California, through her Constitution, to make the discrimination.

X.

Equities of the Bill.

The bill alleges, and the demurrer confesses that the State Board of Equalization "in making said pretended assessment did not assess the franchise, roadway, road-bed, rails and rolling stock of said corporation at their actual value, but did knowingly, wilfully and intentionally, not only assess the same at the actual value thereof, but did knowingly, wilfully and intentionally superadd

thereto, and assess the same according to the income derived from the use of the same, and in assessing the same did take into account, and did pretendedly assess not only the actual value thereof, but did likewise assess and include in said pretended assessment the lucrative character of the business done by said railroad upon said franchise, roadway, road-bed, rails and rolling stock of said corporation, and did assess the same, not only at the actual value thereof, but at the actual value thereof as increased by the supposed lucrative business done upon the line of said railroad. That by taking into account the supposed lucrative character of the business done upon the line of said railroad company, and including the same in said pretended assessment, said State Board of Equalization did thereby wilfully, knowingly and intentionally increase said assessment at least one-third over and above the actual value of the franchise, roadway, road-bed, rails and rolling stock of said corporation, and said State Board of Equalization, * * * * did therein and thereby knowingly, wilfully and intentionally design and intend to assess said corporation at a higher rate than the individual taxpayers of said State."

While it is true that mere errors of judgment in the assessment are not matters that can be corrected in a Court of equity, it is no less true that when unconstitutional principles are adopted in making an assessment, it may be assailed in equity upon that ground.

As remarked by the Court in the *State* vs. *Central Pacific Railroad Company*, 7 Nev. 105: "Can it be

" maintained that if the taxpayer has inadvertently
" neglected to make a statement as required by
" the Assessor, the latter may disregard every
" known rule for estimating the value of property
" for taxation, and impose a valuation upon it
" which he knows to be exorbitant and unjust.
" In other words, is the taxpayer, under such cir-
" cumstances, completely at the mercy of the As-
" sessor? Clearly not. Every man's sense of
" justice revolts at such a doctrine; nor does the
" law leave the citizen so utterly without protec-
" tion. The statute imposes a penalty for a fail-
" ure or neglect to make out a statement, which is
" the deprivation of the right to have the assess-
" ment made by the Assessor equalized by the board
" constituted for that purpose. Yet he has still
" the right to insist that the officer who in such
" case makes the assessment, shall discharge his
" duty honestly, and that he shall not knowingly
" and fraudulently place an excessive valuation
" on his property. Notwithstanding the failure
" on the part of the taxpayer to return a list
" when demanded, it is no less the duty of the
" Assessor to be governed by just rules and the
" fairest motives in making the assessment of his
" property. Such failure to comply with the de-
" mand of the officer does not place the citizen in
" the condition of an outlaw, beyond the reach of
" law or the protecting arm of a Court of justice.
" To a certain extent, it is true, the statute ex-
" pressly deprives him of a right—that of obtain-
" ing relief before the Board of Equalization.
" This, however, is the extent of the penalty for

"the neglect. This takes from him the right to "claim any reduction in the valuation of his "property if the assessment has been honestly "made; although it may be exorbitantly overes- "timated, but does not deprive him of the right "to claim relief in a Court of justice against an "overestimate, fraudulently and purposely placed "on the property—he is deprived of all remedy "for the errors of the Assessor, but not for his "fraudulent misconduct."

In *Cummings* vs. *National Bank*, 11 Otto, 157, the Court observed: "Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment which is designed to operate unequally, and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. This is precisely the case made by this bill, and, if supported by the testimony, relief ought to be given."

Pelton vs. *National Bank*, 11 Otto, p. 144.
People vs. *Weaver*, 10 Otto, p. 539.
Marsh vs. *Supervisors*, 42 Wis., p. 502.
Palmerly vs. *R. R. Co.*, 3 Dillon, 20.
McConkey vs. *Smith*, 73 Ill., 314.
The C. B. & I. R. R. Co. vs. *Cole*, 75 Ill., 594.
Leferts vs. *Supervisors*, 21 Wis., 690.

Milwaukee Iron Co. vs. *Town of Hubbard*, 29 Wis., 56.
Cooley on Taxation, 547.
1 High on Injunctions, sec. 500.

One other respect in which the legislation of this State invidiously discriminates against railroads, are exemptions made in favor of others, and not accorded them.

In section 1, Article XIII, growing crops and property used exclusively for public schools are exempt from taxation. Under section 4 of the same article, individual taxpayers are subject to taxation only for the excess of the value of property over the encumbrances on it. In this case, the extent of the encumbrance on the property in question are alleged, yet no deduction, under the Constitution, can be made on their account.

We have already referred to the provisions of the Constitution of the United States, and of the Statutes of the United States, passed in pursuance of that Constitution, insuring equality of burden to all persons within the jurisdiction of the United States. Under those provisions it is obvious that no discrimination can be made in contravention of them, whether by a State statute or a State Constitution. They insure equality of obligations and equality of burden. It needs no argument to show to the Court that the discrimination referred to does not allow the same equality to railroad corporations that is allowed to individuals.

Respectfully submitted,

HALL MCALLISTER,
Counsel for Complainant, & Appel

APPENDIX I.

In the Circuit Court of the United States for the District of Nevada.

CHARLES FORBES,

vs.

THOMAS GRACEY,
CALIFORNIA MINING COMPANY,
JOHN W. MACKAY, and
JAMES G. FAIR.

This is a motion made on behalf of the complainant for an interlocutory injunction restraining the defendant Gracey from collecting and the other defendants from paying the tax laid upon the proceeds of the California Mine for the quarter ending June 30, 1876. The motion was made upon the bill, and the defendant Gracey shows cause against it by a demurrer and an affidavit touching the equities of the bill.

The bill alleges that the complainant is an alien and a stockholder in the California Company; that that company is a corporation organized under the laws of California, and that Mackay and Fair are citizens of Nevada; that said corporation is in possession of the "California Mine," but has never purchased it, and the title is still in the United States. It then refers to the compact in

the Nevada Enabling Act not to tax or interfere with the disposition of the public lands, and quotes at length the law of Nevada taxing the net proceeds of mines. It states that the defendant Gracey is Assessor of Storey County, and has assessed the ores taken from said mine, against the said company for the second quarter of 1876, and a tax upon them of $71,852.03; that he has demanded and still is demanding from the defendants Mackay and Fair, Superintendents of said company, and its agents at Virginia City, the said tax, and that said Gracey "has threatened and still threatens, and is about, and will, unless restained, seize" property of said company, and sell it to satisfy the tax; that the tax is one collected every three months, and is a continuing grievance; that the defendant Gracey is irresponsible ror the amount of any one quartlerly tax, and his bond is only $4,000. That the Nevada tax law unjustly discriminates against the mines; that the tax and assessment are invalid and illegal, because at the time the assessment was made, the yield of the mine had not then become "proceeds," and because the yield for that quarter at the time the assessment was made was not within the State of Nevada, but had been exported therefrom; that Mackay and Fair are about to and will pay the tax unless restrained; the bill next alleges the notice given by complainant to the corporotion of his interest as a stockholder, of the tax and its illegality, and his demand that the corporation institute suit to test its validity, and his protest against the payment of

the tax, and the refusal of the corporation to comply; that he sues for other stockholders who shall in due time come in, and he is entirely remediless except in a Court of equity.

The demurrer is upon several grounds, those urged being that the complainant has a complete and adequate remedy at law, and there is a total want of equity in the bill; that there is a non-joinder of necessary parties plaintiff, because all the stockholders should have been joined; that there is a defect of parties defendant, because the directors should have been made defendants, and Mackay & Fair should not have been.

Upon the argument, the point was made that a stockholder cannot maintain a suit of this kind, although the rights of the corporation are involved, and the Board of Trustees refuse or decline to take the proper steps to assert them. But this point is settled authoritatively in favor of the right of the stockholders to sue under the circumstances mentioned by our Supreme Court.

Dodge vs. *Woolsey*, 18 How., 331.
Davenport vs. *Dows*, 18 Wall., 626.

And see:

Huntington vs. *C. P. R. R. Co.*, 2 Saw., 503.

And while the corporation must be made a party to the bill, it is held unnecessary to make the directors parties in such suit, when no relief is prayed against them.

Heath vs. *R. R. Co.*, 8 Bl., 347, and cases there cited.
Davenport vs. *Dows*, supra.

So it seems equally well settled that the suit can be maintained without making all the other stockholders parties; at least, if the suit is brought for the benefit of all. It is no longer doubted, says our Supreme Court, in *Dodge* vs. *Woolsey*, "either in England or the United States, that Courts of equity have a jurisdiction over corporations at the instance of *one* or more of their members."

Winch vs. *R. R. Co.*, 13 Eng. L & E., 506.

Mackay & Fair are alleged to be the agents of the corporation of whom payment of the tax has been demanded, and about to pay the alleged illegal tax unless restrained. Under these circumstances, they seem to me to be proper, though perhaps not indispensable, parties to the bill. I consider none of the objections made to the parties in the bill well taken.

The next point raised by the demurrer is that the complainant has an adequate remedy at law, and that there is no fact stated in the bill authorizing the interposition of a Court of equity.

It is admitted that the illegality of the tax, and the threatened sale of the property for its payment, constitute, of themselves alone, no ground for such interposition. The rule is, that "there must be some special circumstances attending a threatened inquiry of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked."

Davis vs. *Chicago*, 11 Wall., 108.

The "special circumstances" which give a Court of equity jurisdiction, may be such as require the aid of the Court by injunction to prevent or remove a cloud on complainant's title, to prevent a multiplicity of suits, "or to prevent any injurious "act by a public officer for which the law gives no "adequate redress."

Carroll vs. *Safford*, 3 How., 459.
Dow vs. *Chicago*, supra.
Huntington vs. *Railroad Co.*, supra.

Does the law furnish this complainant with adequate redress, for the injury which he sets out in his bill?

As this case is now presented upon bill and demurrer, it appears for the purposes of a decision on this point that the defendant corporation is about to pay and will pay unless restrained an illegal tax, and that the corporation refuses to bring any suit, or take any steps to test the validity of the tax or resist its collection.

It may then be granted that the corporation itself, in case it saw fit to proceed, would have complete legal redress, either by paying the tax under protest and suing to recover it, or by an action of trespass, or replevin against the officer seizing property to satisfy it, without granting that this complainant has any such legal redress within his reach. For the very gist of his complaint and the main ground upon which he stands in a Court of equity, is that the corporation is about to pay the illegal tax and refuses to use its legal remedies, and nothing can be clearer than that the stock-

holder has no such direct legal interest in, or right to, the property of his corporation as enables him to sue in a Court of law for an injury to that property. The legal right to the property taxed is in the corporation, and according to all legal rules, an action for an injury to that right must be brought by the corporation.

Where, then, is the stockholders' legal redress? He himself, can not sue to enforce the rights of the corporation without making it a party defendant, so that it may be bound by the judgment. (*Davenport* vs. *Dows*, supra.) So, too, ordinarily in a suit like this, all the other stockholders must be made defendants, or the suit be brought as in this case, for their benefit. The suit is one of equitable cognizance in every aspect.

It has been held, that where the State laws made no provision for suit against the State, and a portion of the tax when collected was paid into the State Treasury, the plaintiff was left without any adequate relief at law, and might enjoin the illegal tax. (*Bank* vs. *Douglass County*, 3 Dil., 298). The State of Nevada has no law authorizing suits against it, and its portion of the taxes, when collected, is paid into the county treasury for the use and benefit of the State, and is paid over to the State Treasurer whenever that officer and the Controller order it to be done.

2 Comp. Laws, Nev., p. 209, 218, 219.

If it should be admitted that the stockholder can sue either the trustees or the corporation at law for the misappropriation of the corporate funds to

the payment of an illegal tax, then every other stockholder can sue, and this leads directly to a multiplicity of suits.

Upon this question, I am of the opinion that the bill in this case does state the special circumstances which bring the complainant's case within the recognized heads of equity-jurisdiction, taking it for granted that the tax is illegal as the bill states.

The remaining points are to the merits of the case made by the bill. The first one is, whether the tax upon the proceeds of the mine—the mine being a part of the public domain—is a tax upon the mine itself, so far as to be a violation of the compact contained in sec. 4, of the Nevada Enabling Act, "that no taxes shall be imposed by said "State on lands or property therein belonging to "the United States," or an interference with the power of Congress to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Numerous authorities were cited by the complainant, establishing beyond all question that Congress has the entire control of the public lands; that it may sell or give them away; that so long as the United States remains the owner, they cannot be taxed by the State; that when the lands have been sold or donated, and the certificate of entry of the land officer has been given, the Government holds the naked legal fee in trust for the purchaser who then has the equitable title, and

the lands are then, and not before, subject to State taxation, although the patent has not issued.

Witherspoon vs. *Duncan*, 4 Wall., 210.

A very forcible argument has been made by complainant's counsel against the power of a State to tax—as is done in California and Nevada—the value of improvements on, or of possessory rights to the public lands within the State.

In the view I have taken of this case, however, I do not find it necessary to decide that question.

The tax complained of in this case is not nominally a tax on the improvements or possessory right, but a tax on the proceeds of the mine, or in the language of the Statute "on the ores and "mineral-bearing material of whatever character" extracted from the mine. These ores are assessed quarterly in the mode provided by statute. Such a tax, it is argued, is in effect a tax on the mine, which is the property of the United States, just as a license tax on the importer was held to be a tax on imports. (*Brown* vs. *Maryland*, 12 Whea., 419.) Courts, it is said, should and will look through names and forms to the substance and reality, and hence if this burden does really fall upon the mine it is none the less illegal because levied in the name of a tax on the ores extracted—all this must be conceded. But the State is only prohibited from taxing the lands or other property of the United States, so that if it be found that the United States has in fact parted with all its interest in the ores taxed, this case is taken out of the rule laid down in *Brown* vs. *Maryland*.

The policy of Congress touching the public mineral lands, as found in its legislation, is, in some important respects, different from that touching other public lands, and, to my mind, has an important bearing on the main questions involved in this case. This difference in policy springs from the diversity in the two species of property.

The beneficial occupation and enjoyment of mineral land requires the destruction of the estate —the taking away of all there is in it of value. Agricultural land, on the contrary, in the course of proper husbandry, increases in value with time and its profitable use and enjoyment.

A moment's inspection of the mining laws will show that Congress, while retaining the naked legal title in the United States, has in fact parted with all that is valuable in the mines. By sec. 2322 of the Revised Statutes of the United States it is provided that "the locators of all mining locations * * on any mineral vein, lode or ledge, situated on the public domain, *their heirs and assigns* * * * so long as they comply with the laws of the United States and with State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the *exclusive* right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines," etc., and by sec. 2324, upon the failure of any one of several co-owners to contribute his proportion of the required expenditures, after

notice published, "his *interest* in the claim shall become the property of his co-owners." And in sec. 2332, liens which have attached to a placer claim before patent are not to be impaired by the issue of the patent.

The practical effect of this legislation is to confer on the mining locator and his assigns something more than a pre-emption right. The locator acquires under it an exclusive right of possession, which he can transmit to his heirs and assigns, and this possession continues so long as the laws are complied with. His "possessory title" is recognized, and State laws regulating it also, if not in conflict with the laws of the United States. In short, under this law, the locator has a valuable possession of and property in the mine, and may lawfully take out and appropriate all the valuable ores and mineral therein; that is to say, all there is of value in the estate. What more would a patent secure to him? Practically nothing. Indeed, it is common knowledge in this State that the right secured by the locator under this law is regarded as of about equal dignity with a patent, and in some instances as the preferable title to a mine.

It seems to me indubitable that the ore extracted by a locator or his assigns is his property as absolutely as if the Government had clothed him with a perfect legal title to the mine, and it is impossible for me to see how a tax on this ore, so granted to the miner, is a tax on the lands or property of the United States. In *McCullough* vs. *Maryland*, 4 Wh., 415, 436, the Supreme

Court, while holding a tax on the operations of the bank unconstitutional, said that the opinion did "not extend to a tax paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland held in the institution." I cannot perceive that a tax upon the real property of the bank would not as nearly be a tax on its operations as a tax on the products of a mine, the peoceeds being the property of the miner, is a tax on the mine. So in the *Railway Tax Cases*, 15 Wall., 232, although it was held that a tax of so much per ton on freight, carried from one State to another, was a tax upon transportation, and therefore a regulation of commerce forbidden by the Constitution, yet it was laid down "that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freights between States," had become subject to legitimate taxation. It was admitted, too, that this tax would ultimately increase the cost of transportation. Is this tax on the proceeds of the mine any more a tax on the mine, than a tax on a railroad-car, or on the gross receipts is a tax on transportation? I think not. Yet both, in some degree, perhaps, approach taxation admitted to be unlawful.

If then I have rightly conceived the import and effect of the mining law, and it does operate as a virtual transfer to the locator of the entire property in the ores extracted, it must follow that a

tax on those ores is neither a tax on the property or lands of the United States, nor any interference unwarrantably with the disposition of the public lands, and that the complainant's objection to it is not a valid one.

It is next to be determined whether the property taxed was within the jurisdiction of the State when it was taxed.

The bill states "that at the time said tax assessment was made, the yield of said California Mine for the said second tax quarter of the year 1876, was not within the State of Nevada, but had been exported therefrom, nor was the owner of such yield, to wit: the California Mining Company, then within the State of Nevada, or then or ever a citizen thereof or a resident therein." This is not denied, but the answer to it is that the property taxed, though out of the State at the time of the assessment, was within it when the tax was levied. The course of taxation of this species of property is as follows: By the general revenue law an annual ad valorem tax of 125 cents upon each 100 dollars value of taxable property is levied for State purposes upon the "assessed value" of all taxable property in this State, "including the proceeds of mines and mining claims."

2 Comp. Laws, sec. 3125.

The manner of assessing the proceeds of mines is as follows: It is the duty of County Assessors to "compare and complete quarterly, on or before the second Monday in February, May, August,

and November in each year, a tax list or assessment roll of the proceeds of mines," in their respective counties for the preceding quarter. The assessment is made upon ores extracted, and *reduced or sold* during the quarter preceding the assessment. The value of the ore is ascertained by deduction from the gross yield or value of the total number of tons extracted and reduced or sold during the quarter, the cost of extracting, transporting and reducing or selling the ore. Act of Feb., 1871, 2 Comp. L. P., 225. By section six of this Act of 1871, it is provided that " Every tax levied under the authority of the Act shall be a lien on the mine from which the ores are extracted which shall attach on the first days of January, April, July and October of each year."

The facts may be stated thus: During the quarter ending June 30, 1876, as shown by its own statement, the net yield or value of the ores extracted by the California Mining Company for that quarter was $3,736,000 $\frac{46}{100}$. The assessment was made upon this valuation, but made after the expiration of the quarter, and after the bullion obtained by the reduction of the ores had been exported beyond the State. The ores taxed are taken out and reduced in this State during the quarter. The California Mining Co. is a a non-resident.

Under these circumstances is the tax on the proceeds legal ?

Was the property taxed so within the jurisdiction of the State during the fiscal year as to be a

proper subject of taxation? For if it was, the power of the State as to mode, form and extent of taxation is unlimited unless restrained by provisions of the Constitution of the United States. (State Tax on Foreign Held Bonds, 15 Wall., 300.) State taxation may touch property within its jurisdiction in every shape, in its natural condition, in its manufactured form, and in its various transmutations, ibid. "The protection of the Government," says Mr. Cooley, "being the consideration for which taxes are demanded, all parties who receive or are entitled to that protection may be called upon to render the equivalent. But a personal tax can not be assessed against a non-resident, neither can the property of a non-resident be taxed, unless it has an actual *situs* within the State, so as to be under the protection of its laws." (Cooley on Tax., 14.)

For some purposes personal property is said to have no *situs*, and, in the absence of positive law in the place of its actual location, its transfer is regulated by the law of the domicile of the owner. (Storey Con. Laws, sec. 383.) But for the purpose of taxation, it may have an actual *situs* distinct from the domicile of the owner.

Hoyt vs. *Commissioners*, 23 N. Y., 224.

In the case of ores extracted by the California Company, it seems to me clear that there is a time during the quarter for which they are taxed when they have an actual *situs* in this State, for the purpose of taxation. That is during the time, after they are taken out of the mine, that they are undergoing the process of reduction, and until, at

last, the bullion produced by such reduction is carried out of the State. As a subject for taxation, they have no other situation. During that period they are protected in Nevada, and may be taxed and regulated by that State.

This being so, is it indespensable that the bullion obtained from the ores taxed should be within the State at the time the assessment-roll is made up?

The complainant insists that it is, but the defendant, Gracey, says that it is sufficient if the property taxed is within the jurisdiction of the State at the time of the levy of the tax. By the Revenue law of Nevada, it is provided that an annual tax "is hereby levied, and directed to be "collected and paid." Boards of County Commissioners are authorized to levy a tax for county purposes each year. As the word is used in this revenue law, the levy of a tax seems to be nothing more than a declaration by the Legislature or the Board of Commissioners of the amount of tax which shall be assessed and collected for a given year.

Strictly, however, a levy is the raising of a tax, and includes its assessment, collection and paying over.

If the levy of the tax does bind property, it is immaterial for the purposes of this case whether it takes effect on the first day of January, which is the first day of the fiscal year, or on the first day of April, as seems to be the judgment of the Supreme Court of Nevada, because that is the day when the lien for taxes attaches each year

(*State* vs. *Eastabrook*, 3 Nev., 173), or on the first day of each quarter, as to the proceeds of mines, for in either case the levy of the tax now in question, in the sense of the Nevada Revenue law, was made before the property taxed was removed from the State and County.

But be this as it may, I am constrained to uphold the validity of the tax and of its assessment, for the following, among other considerations.

The provision of the Legislature, levying and fixing the rate of the tax, the assessment of property on which the tax is imposed, its collection and payment over to the treasurer, are all a part of one thing—directed to the accomplishment of one object—which is raising revenue for each fiscal year.

The property taxed must be within the jurisdiction of the State during the fiscal year, it is true; but it is not, it seems to me, essential that it should be so situated at every stage of raising the tax.

The property once, where the State has a right to tax it for any given year or quarter, I cannot see that the power of the State to tax necessarily depends upon the length of time it remains there. The right to tax having attached, the State must be the judge of the mode to be employed for its taxation; with that the Courts have nothing to do.

"It is not for us," says the Supreme Court of the United States, "to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed

by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The Delaware Railroad Tax, 18 Wall., 206–231.

The objections to this assessment seems to me to be the mode, rather than to the right of assessing. Whether the assessor shall attend each day at the mine and assess the ores as they reach the surface, or follow them to the reduction works and there assess their value, or shall wait, as prescribed by the existing law, until the expiration of the quarter, and then assess the value from sworn returns made to him by the officers of the company having the necessary knowledge of the facts, are but different modes of ascertaining the value of the property subject to taxation during the quarter for which it is so assessed.

If the assessment were laying the tax, it would be difficult, indeed, to sustain the present tax. But it is not so. The word assessment as used in the Nevada revenue law, means the determining the value of property subject to taxation, and is made after the tax is laid, and the rate of it fixed.

It being true, as I think it is, that there was a time during the second quarter of this fiscal year when the State had jurisdiction to tax the proceeds of the California mine, by reason of their actual *situs* here, it may take any mode consistent with its constitution for assessing the value and collecting the tax.

The mode pursued in this case has been held, by the Supreme Court of Nevada, to be both uniform and equal in the sense of those words as used in the Constitution of Nevada. This decision I am bound to accept as conclusive. The same is to be said of the uniformity and equality of the rate of the tax.

State vs. *Kruttschnitt*, 4 Nev., 178.

The limitation on the power of the State to tax, beyond that found in its Constitution and laws is, that the property shall be within its jurisdiction, and this I have found to be the fact here.

The rule to show cause is discharged, and the temporary restraining order is dissolved.

The case of this same complainant against the Consolidated Virginia Mining Company, Thomas Gracey, John Mackay and James G. Fair is one involving the same questions as the foregoing, and was argued at the same time.

A like order is to be entered in that case.

E. W. HILLYER,

Judge.

APPENDIX II.

State Statutes cited.

3664. "On or before the first Monday in May, in each year, the State Board of Equalization shall assess the franchise, roadway, road-bed, rails and rolling stock of railroads operated in more than one county. The President, Secretary, Cashier, or Managing Agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish said Board, on or before the first Monday of April, in each year, a statement signed and sworn to by one of such officers, showing in detail, for the year ending on the first Monday in March in such year:

(*a*) The whole number of miles owned, operated or leased in the State by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

(*b*) Also a detailed statement of the number and value thereof, of engines, passenger, mail, express, baggage, freight, and other cars or property used in operating or repairing such railway in this State; and on railways which are part of lines extending beyond the limits of this State, the return shall show the actual amount of rolling stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling stock, the

annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all property designated hereafter in this section, and such other facts as the State Board of Equalization may, in writing, require.

If such officers fail to make such statement, said Board of Equalization shall proceed to assess the property of the corporations so failing; the valuation fixed by them shall be final and conclusive. The said property shall be assessed at its actual cash value. The assessment shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and rolling stock. The depots, station grounds, shops, buildings, and gravel beds, shall be assessed by the Assessor of the county where situated, as other property. On or before the fifteenth day of May, in each year, said Board shall transmit to the County Assessor of each county through which any railway, operated in more than one county, may run, a statement, showing the length of the main track of such railway within the county, and the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole property named in this section. Said statement shall be entered on the assessment roll of the county. At the first meeting of the Board of Supervisors after such statement is received by the County Assessor, they shall make and cause to be entered in the proper record book, an order stating

and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district, in their county, through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the Clerk of the Board of Supervisors shall transmit a copy of each order or equalization to the City Council, or Trustees of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxing districts through which such railway runs. The taxes on said property for State and county purposes, after collection by the County Collector, shall be paid over to the County Treasurer as other taxes. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes, as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxing districts."

Amendments to Codes, 1880, pp. 13–14.

An Act to amend section three thousand seven hundred and thirteen of the Political Code.

Approved April 16th, 1880.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section three thousand seven hundred and thirteen of the Political Code is hereby amended so as to read as follows:

The State Board of Equalization must, for State purposes for the thirty-second fiscal year, fix such an ad valorem rate of taxation upon each one hundred dollars of taxable property of this State as will raise, for the thirty-second fiscal year:

First—For the General Fund, one million seven hundred and fifty thousand dollars.

Second—For the School Fund, one million four hundred thousand dollars.

Third—For the Interest and Sinking Fund, three hundred and fifteen thousand dollars.

SEC. 2. This Act shall take effect immediately.

FILED
DEC 29 1881
JAMES H. McKENNEY, Clerk.

No.

IN THE

Supreme Court

OF THE

UNITED STATES.

C. P. HUNTINGTON,

Appellant,

vs.

CHAS. E. PALMER, ET AL.,

Appellees.

Brief of Harvey S. Brown,

Of Counsel for Appellant.

Filed ..... *1881.*

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H. S. CROCKER & CO., STATIONERS AND PRINTERS, S. F.

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A statement of the case will be found in the Brief of Mr. Hall McAllister.

ARGUMENT.

I.

The Power conferred upon the State Board of Equalization relative to the Assessment of Railroads operated in more than one County is in violation of the Fourteenth Amendment to the Constitution of the United States.

THE OBLIGATION.

An obligation rests upon every property owner to contribute his proportionate share to the support of the government.

THE SYSTEM TO ENFORCE THIS OBLIGATION.

To enforce this obligation the Constitution of the State of California provides a system applicable to the great mass of property, the salient features of which are that all property shall be taxed in proportion to its value to be ascertained as provided by law (Art. XIII, section 1). That property shall be assessed in the county, city or district in which it is situated in the manner prescribed by law (Art. XIII, section 10). That the Boards of Supervisors must equalize the valuation of the taxable property of the county (Art. XIII, section 9), and that a State Board of Equalization shall equalize valuations as between the counties. (Id.)

This system requires legislation to carry it into effect—the manner of assessment and the means by which the proportions are to be ascertained are left to legislation, except in so far as means for the latter purpose are found in the constitutional requirements relative to the Boards of Equalization. The legislation providing the manner of assessment and the means of ascertaining proportions must be had in subordination to the constitutional provisions that "all laws of a general nature shall have a uniform operation" (Art. I, sec. 11), that "no local or special laws" shall be enacted "for

the assessment or collection of taxes" (Art. IV, sec. 25, subdivision 10,) that "privileges and immunities" shall not be granted to any citizen or class of citizens "which upon the same terms shall not be granted to all citizens," (Art. I, sec. 21,) and that no person shall "be deprived of life, liberty or property without due process of law." (Art. I, sec. 13.)

All of the safeguards compatible with the power involved are thrown around its exercise. The right of local self-government is acknowledged, for the assessment must be made by local officers. That each person is to pay a local tax in proportion to the value of his property, is admitted in the creation of a local board to adjust proportions. That the State tax is to be apportioned so that equality is preserved between the taxpayers of different localities, a State board has been created to adjust proportions between the localities; but above all the right of every person to be heard at some point of time before his liability becomes fixed is recognized as a fundamental principle.

DEPARTURE FROM THE SYSTEM.

Having instituted this system—co-extensive in its operation with the territorial limits of the power levying the tax and including within its scope all kinds of property, the same Constitution provides: "The franchise, roadway, road-bed, rails and rolling stock of all railroads operated in

more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Franchises, roadways, road-beds, rails and rolling stock, as separate and distinct classes of property, are not withdrawn from the operation of the general rule, for all such property when owned by railroad companies, the roads of which are operated in a single county, are governed by the general rule.

Property situated partly in one county and partly in another is not as a class so withdrawn, for lands and houses so situated fall within the general rule.

Property operated in more than one county is not as a class so withdrawn, for telegraph lines, water ditches, flumes for transporting lumber for hire, stage and freight lines, turnpike roads, and other property so operated falls within the general rule.

If a classification based upon use is admissible, none such has been made, for all property used in more than one county has not been included.

If a classification based upon ownership is admissible, none such has been made, for all property owned by persons operating in more than one county has not been included.

Locomotives, as a species of property, are not to be assessed by the State board; but whether

they are to be so assessed is made to depend upon whether they are owned by given persons or corporations. In other words, the discrimination is, in part, between owners of the same species of property.

No class or genus or even species of property has been separated from the great mass and made subject to a special rule, but certain property has been taken out of the rule applicable to its species, and has been made, by reason of its ownership, subject to the special rule, and, as to it, none of the safeguards thrown around the enjoyment of other like property has been preserved.

No local assessor may fix its value; no local board may consider it in adjusting proportions for local taxation. Its owner may not appeal to the local tribunal open to the owners of other property. (*State Board of Equalization* vs. *Board of Supervisors of Sacramento County*, Appendix III.) The clause of the Constitution, which attempts to confer the whole power of valuation upon the State Board of Equalization, is arbitrary and self-executing. The Board may exercise its power unrestrained by the established principles of private rights and distributive justice.

DANGEROUS AND UNUSUAL POWERS CLAIMED.

The power of this board under the Constitution is strongly but accurately stated by the Attorney-General of California, in his brief filed in the Supreme Court of California, in the case of the *San Francisco and North Pacific Railroad Company*

vs. *The State Board of Equalization.* (Brief, p. 11.) Says the learned Attorney-General: "There is nothing in the Constitution or statutes requiring such notice—(a notice of some kind to the property owner before his liability is fixed)—or pointing out specifically the manner to be pursued by the board in making assessments and fixing valuations. This being so, it may adopt such a mode of proceeding as appears to it suitable and proper. * * * If the board has adopted no general rules applicable to all cases, then whatever manner was adopted by the board to make the present assessment complained of became the rule of this case, the board having authority to make rules for its government can change such rules as often as it sees fit; can adopt a new rule for each case that comes before the board, if it desires so to do."

From the time of the establishment by James II of the "High Commission" to the time of the creation of the State Board of Equalization in California, no tribunal has existed either in England or America *which even claimed* the right to deal with life, liberty or property, subject to no rules except those of its own pleasure, and changeable at its own will.

It becomes a Court to pause before giving ear to the monstrous pretensions of the State Board of Equalization, voiced by the Attorney-General. Nearly two centuries have elapsed since the unlimited power to deprive the citizen of property except in accordance with the "laws of the land" has been asserted in any country where the

English language prevails. It is historical that the "High Commission" dared not enforce its judgments against property because an attempt to do so would enable the party injured to invoke the jurisdiction of the Common Law Courts. That the Solicitor-General shrank from facing such a Court, *packed even though it was* with a claim that the "High Commission," in passing upon property rights, "could make rules for its own government, change such rules as often as it saw fit, and adopt a new rule for each case if it desired so to do."

Lord High Steward Jeffries' answer to the Bishop of London, descriptive of the powers of that tribunal, "This Court does not proceed upon written allegations; its proceedings are summary and by word of mouth; no fixed mode of procedure; no rules of evidence govern its movements," is the same description which the Attorney-General of California gives of the powers of the State Board of Equalization.

THE FEDERAL CONSTITUTION FORBIDS THE EXERCISE OF SUCH POWERS.

The provision of the State Constitution making the discrimination and conferring the power in question is obnoxious to the 14th Amendment to the Federal Constitution.

A. It denies to persons within the jurisdiction of the State the equal protection of the laws; and

B. It deprives such persons of their property without due process of the law.

A.

THE PROVISION OF THE STATE CONSTITUTION WHICH PROVIDES FOR THE ASSESSMENT OF THE PROPERTY OF RAILROAD COMPANIES OPERATING IN TWO OR MORE COUNTIES, DENIES TO SUCH COMPANIES THE PROTECTION OF THE GENERAL RULES PRESCRIBED IN THE SAME CONSTITUTION, AND IS THEREFORE VOID.

The people of the United States have ordained (sec. 1, Art. XIV, Const. of U. S.) that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the law."

These inhibitions upon the States apply "to all the instrumentalities and agencies employed in the administration of its government."

Ah Kow vs. *Nunan*, 3 Sawyer, 157

"It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

Virginia vs. *Rives*, 100 U. S. R., 318;
Ex-parte Virginia, *id.*, 339 and 346.

The language of the 14th Amendment, in so far as it deals with "privileges and immunities," is not new even to the Federal Constitution.

The second section of Article IV of the Federal Constitution, declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The section last cited has universally been held among other things, to mean that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected, and that such property shall not be liable to any taxes or burdens to which the property of the citizen is not subject to.

Campbell vs. *Morris*, 3 H. & McH., 554.
Corfield vs. *Coryell*, 4 Wash., 361.
Ward vs. *Morris*, 4 H. & McH., 338.
Wiley vs. *Palmer*, 14 Ala., N. S., 632.
Crandall vs. *State*, 10 Conn., 343.
Oliver vs. *Washington Mills*, 11 Allen, 281.

The object of this constitutional provision was to prevent discriminations in these respects between citizens of the State in which the law was enacted, and citizens of other States in the Union. The prohibition referred to and contained in the 14th Amendment is in the same words, but is directed to the States, and forbids discrimination between citizens of the same State.

EQUALITY BEFORE THE LAW.

The last clause of sec. 1, Art. XIV Federal Constitution, forbids any State "to deny to any

person within its jurisdiction the equal protection of the law."

Equality of protection is assured to every one. The prohibition "implies not only," says Mr. Justice Field, (*Ah Kow* vs. *Nunan*, 3 Sawyer, 157,) "that the Courts of the country shall be open to him on the same terms as to all others, for the security of his person or property, the *prevention or redress of wrongs*, and the enforcement of contracts; but that no *charges or burdens* shall be laid upon him which are not *equally* borne by others."

In *Missouri* vs. *Lewis*, (101 U. S. Reports, p. 22,) it was held, substantially, that a State may establish one system of law in one portion of its territory and another system in another, *provided always*, that it neither encroaches upon the proper jurisdiction of the United States, *nor abridges the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same district.*

The case arose under the Constitution and laws of Missouri, by which an appeal lay to the Supreme Court of that State from any final judgment of a Circuit Court, except those in four counties in the State and the city of St. Louis, for which counties and city the Constitution of 1875 established a separate Court of appeal, called the St. Louis Court of Appeal, and gave to it exclusive jurisdiction of all appeals from Courts of those counties and the said city. One Bowman, a resident of St. Louis County, was, by the judgment

of the Circuit Court of that county, removed from the practice of law in the State, he having, by verdict of jury, been found guilty of a charge preferred against him. From that judgment he took an appeal to the St. Louis Court of Appeals, where the judgment was affirmed. He then applied to the Supreme Court of Missouri for a mandamus to compel the St. Louis Court of Appeals to grant his application for an appeal to the Supreme Court, which application was denied, and from the judgment denying the application the State of Missouri, on the relation of Bowman, brought the case, by writ of error, to the Supreme Court of the United States. In the latter Court it was claimed that the provisions of the Constitution and laws of the State of Missouri, denying to the citizens of the four counties and of the City of St. Louis the right of appeal to the Supreme Court, which was given to citizens of the other counties of the State, were in violation of the Fourteenth Amendment to the Constitution of the United States, in this, that they denied to the citizens of the former district the equal protection of the law. The Court affirmed the judgment of the Supreme Court of Missouri, and say: "The true ground on which the case rests is the undoubted power of the State to regulate the jurisdiction of its own tribunals for the different portions of its territory in such a manner as it sees fit, subject only to the limitations (in the opinion) before referred to."

The limitations before referred to were, that "*every person residing or being in either portion*

of the State should be accorded the equal protection of the laws prevailing there;" and the Court say: "That, with this limitation, he could not justly complain of a violation of the Fourteenth Amendment, for, as said, it has respect to persons and classes of persons; it means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

To maintain the validity of the Constitution of the State of California in respect to the subject-matter of this action, it must be held that every other taxpayer in a county, except the parties in interest here, may apply to the local board of that county acting in a judicial capacity, to redress a wrong done by an assessor in the valuation of his property, or to relieve him of a burden not equally borne by others; but the parties in interest here cannot so apply. Can a law which admits of a proposition so monstrous be upheld in the very face of a constitional provision which may be summed up in a single sentence—"The equality of all before the law."

The new Constitution of California (Art. I, section 11,) provides that "all laws of a general nature shall have a uniform operation;" and in section 21, Art. I, makes the declaration, "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The language of these clauses which limit the power of the Legislature if we substitute the

word "persons" for "citizens" in the last clause would be the exact equivalent of the language of the XIV Amendment to the Federal Constitution, which limits the power of the States. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws."

If this proposition be correct we shall have but little difficulty in making the application to this case. To support it we have the judgment of the Supreme Court of California, in *Brooks* vs. *Hyde*, 37 Cal., 376–7–8. That case arose under the old Constitution, and the question involved was the construction of sec. 11, of Art. I, of that Constitution, "That all laws of a general nature shall have a uniform operation." In that case Mr. Justice Sanderson, delivering the opinion of and speaking for a ma-jority of the Court said: (*Brooks* vs. *Hyde*, 37 Cal., pp. 376, 377 and 378.)

"Whatever of difficulty there may be in comprehending, when by itself considered, the precise office which this clause of our Constitution was designed to perform, it is removed when we read it in connection with the context of the Constitution, from which it was manifestly borrowed.

"As a matter of history, it is well known that our Constitution is in many respects copied from that of Iowa. Upon motion of Mr. Gwin, the Constitution of Iowa was adopted by the Constitutional Convention as a basis for ours, for the reason, as stated by him, that it was one of the latest and shortest. (Debates of Convention, p. 24.) The first article was reported by a

committee of which Mr. Norton was chairman, and, as first reported, consisted of sixteen sections, including the one in question, bearing the same number which it now has. Speaking of the report, Mr. Gwin said the first eight sections were from the Constitution of New York, and all the others were from the Constitution of Iowa. (Debates of Convention, 31.) So far as it goes, section eleven is a *verbatim* copy of section six of Article I of the Iowa Constitution, with the most important part left out. The latter section reads as follows:

"'SECTION 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'

"Here the meaning of the first clause of the sentence, which, by reason of the 'glittering generality' of the language, when by itself considered, is obscure if not unintelligible, is explained and made clear by the latter clause, which serves as a definition to the first. The first clause is the shell, and the latter is the meat; and it is a little surprising that our Constitutional Convention, if unwilling to take both, should choose the former. Viewed through the medium of the latter clause, the meaning of the first is made so obvious that they may not have detected its intrinsic obscurity, and with a view to brevity, may have concluded to take the rule without its definition. However that may be, the meaning of the clause, as used in the Iowa Constitution, is obvious, and we must presume that when our Constitutional Convention borrowed the language they also borrowed the meaning, and designed that it should establish the same rule of legislative action which, by express

definition, it is made to establish in the Constitution from which it was taken.

"I am, therefore, of the opinion that the true intent and meaning of section eleven of Article First of our Constitution is to the effect that the Legislature shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Thus interpreted, it affords a reasonable and salutary restriction upon legislative power, and, in my judgment, any other reading would render it meaningless and absurd."

Mr. Justice Crockett expressed no opinion and Mr. Justice Rhodes dissented. The reasons for his dissent are not given, but from his well-known views, it was not because the majority of the Court had held the rule too strict, but just the reverse.

In *Ward* vs. *Flood*, (48 Cal., 50,) Chief Justice Wallace, speaking for the Court, says: "The protection of law is indeed inseparable from the assumed existence of a recognized legal right, through vindication of which the protection is to operate. To declare, then, that each person within the jurisdiction of the State shall enjoy the equal protection of the laws, is necessarily to declare that the measure of legal rights within the State shall be equal and uniform."

In *Guy* vs. *Hermance*, (5 Cal., 74,) the Court say: "The Legislature * * cannot except one case or one party from the operation of a general rule of law, either as to the right *or as to the remedy.*

If these decisions are sound, it is clear that the clause cited from sec. 1, Art. XIV, of the Federal Constitution must be construed to mean precisely the same thing as the clauses cited from the State Constitution.

If we were here assailing a legislative enactment making the discrimination in question, it would be clear that the enactment could not stand in the face of sections 11 and 21 of Article I of the State Constitution.

These sections have no application to the valuation of, and taxation of the property of railroad companies operated in more than one county; for it is said that the framers of the Constitution intended to and did separate this property from the general mass of property in the State, and by the provisions of the last clause of section 10 of Article XIII of the State Constitution, applied a different rule to its valuation for taxation from what had been applied to other property in the State.

In this case the want of uniformity and equality in rights and privileges finds its source in the Constitution. It is the Constitution which gives to one person the right to appeal to a local board and denies the right to another. It is the Constitution which makes the other discriminations of which the petitioner complains.

But this places the respondents in no better position, for if sections 11 and 21 of Article I of the State Constitution would in themselves and standing alone deny the power to the Legislature,

it must follow, as a logical result that section 1 of Article XIV of the Federal Constitution, which is in substance the equivalent of the sections of the State Constitution cited, has no less effect than to deny the power to the State.

The discriminations complained of are:

1. A different manner of assessment.

2. Denial of appeal to local board, and

3. The proceedings in relation to the property here involved is without notice; and

4. That none of the safeguards which the law throws around the assessment and valuation of other property are applied.

ASSESSMENT OF THE ESSENCE OF TAXATION.

An assessment is of the very essence of taxation.

"*Levy* and *assessment* have very different meanings. The levy of taxes is a legislative function, "and declares the subject and rate of taxation."

Burroughs on Taxation, 194.

Cooley on Taxation, 244–5.

"Assessment is a quasi-judicial act, and consists in making out a list of the taxpayers and taxable property, and fixing its valuation for appraisement."

Hilliard on Taxation, 290.

"The distinction is the difference between prescribing a rule of action and administering that rule to persons and subjects that fall within its provisions. * * * * * * * * A law which levies a tax and provides for its assessment will not justify the collection of a tax

until the assessment is first made. To attempt otherwise would be equivalent to attempting to execute a levy against a person or thing before it has been judicialiy ascertained or determined that such person or thing was amenable to its provision. There must be an assessment, either made pursuant to the levy, or adopted as the basis of the levy, else there there can be no lawful collection of taxes."

In Hilliard on Taxation, 291, it is said: "Assessment is so far an indispensable incident to taxation that no right of action arises until a legal assessment is made." So in Cooley on Taxation, 259, it is said, citing many authorities, that "of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities."

THERE MUST BE UNIFORMITY IN THE MODE OF ASSESSMENT AS WELL AS EQUALITY IN THE RATE OF TAXATION.

Cooley on Constitutional Limitations, 3d Ed., p. 622, it is said: "But whatever may be the basis of taxation, the requirement that it shall be uniform is universal. To render taxation uniform in any case, two things are essential: The first of these is, that each taxing district should confine itself to the object of taxation within its limits. The second essential is, that there should be uniformity in the MANNER OF THE ASSESSMENT, and approximate equality in the amount of exactions within the district." 624.

Every attempt to evade this rule, no difference in what form the attempt is made, must fail.

In *Knowlton* vs. *Supervisors of Rock County*, 9 Wisconsin, 410, the facts were, that the City of Janesville included within its territorial limits not only the land embraced within the recorded plat of the village and its additions, but also a large quantity of adjacent farming or agricultural lands. The Legislature passed an act declaring that in no case should the real and personal property within the limits of the city, and not included within the limits of the recorded plat, be subject to an annual tax, to defray the current expenses of said city, exceeding one-half of one per cent. Under the charter of the city other property was liable to an annual tax of one per cent. The Legislature within the same taxing district undertook to provide that a portion of the property should be taxed at one rate in proportion to value, and another portion at a much lower rate.

"It was contended in argument," say the Court, "that as those provisions fixed one uniform rate without the recorded plats, and another within them, thus taxing all the property without alike, and all within alike, they do not infringe the constitutional provision of equality and uniformity; or, in other words, *that for the purposes of taxation the Legislature have the right, arbitrarily, to divide up and classify the property of citizens, and having done so they do not violate the constitutional rule of uniformity, provided all property within a given class is rated alike.*" "The answer to this argument is, that it creates different *rules* of taxation, to the number of which there is no limit, except that fixed by legislative discretion, while the Constitution establishes but one fixed, unbending, uniform rule on the subject. It is

believed that if the Legislature can, by classification, thus arbitrarily and without regard to value, discriminate in the same municipal corporation, between personal and real property within, and personal and real property without, a recorded plat, they can also, by the same means, discriminate between lands used for one purpose and those used for another; such as lands used for growing wheat and those used for growing corn, or any other crop; meadow-lands and pasture lands, cultivated and uncultivated lands; or they can classify by the description—such as odd-numbered lots and blocks, and even-numbered ones; or odd and even-numbered sections. Personal property can be classified by its character, use or description; or, as in the present case, by its location, and thus the rules of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions and locations of real and personal property. We do not see why the system may not be carried further, and the classification be made by the character, trade, profession or business of the owners. For certainly, this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the Constitution operative only to the extent of prohibiting the Legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the Legislature, 'You shall not discriminate between single individuals or corporations; but you may divide the citizens up into different classes, as the followers of different trades, professions or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class, and against

another, as much as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least, outside of those who are the recipients of its favor. We do not believe the framers of that instrument intended such a construction, and therefore, cannot adopt it."

An enactment of the Legislature of the State of Arkansas for raising revenue to support the government of the State, among other things provided that a tax should be levied, first, on all lands within the State; and second, upon all town lots and improvements thereon, and provided that in valuing property in the first class, no reference should be had to the improvements thereon, but that all town lots and the improvements thereon should be included in the valuation. In *Pike* against *The State*, (5th Arkansas, p. 206,) the enactment in question was challenged, upon the ground that it conflicted with the provisions of the Constitution of that State, which ordained that "all property subject to taxation shall be "taxed according to its value—that value to be "ascertained in such manner as the General As- "sembly shall direct, making the same equal and "uniform throughout the State." Constitution of Arkansas, Art. VII. Title Revenue, sec. 2.

The Court said: "From the view which we "have taken, not only of the provision above "quoted, but of every part of the Constitution, "we consider the rule there prescribed to be this, "that property of every character and descrip- "tion upon which a State tax may be levied, "must be taxed in proportion to its real and true

" value, and according to that basis be made to " contribute to the revenue of the State; and " that no portion of any distinct genus or species " of property upon which such tax is imposed, " can ever be exempt therefrom. Therefore, if " such tax be at any time laid upon land, no " lands within the limits of the State, except such " as are or may be exempt by some authority su- " perior to our State Constitution, can be legally " exonerated from the imposition, and it matters " nothing whether the land be situated in a city, " town or village, or in one portion of the State " or another; because the rule is general and in- " flexible, comprehending in such case all lands " subject to the jurisdiction of the State, and " liable to be taxed by her authority."

And again: "This rule we consider so great " and comprehensive as to embrace every descrip- " tion of property upon which a tax may be laid " to raise any portion of the State revenue. And " the Legislature possesses no power to restrict " its operation to such lands or improvements " thereon, or to any other property subjected to " such taxation as may be situated in any specified " portion of the State, or in any sectional or legal " division, or subdivision thereof, because no such " restriction can possibly exist, if the tax imposed " be equal and uniform throughout the State.

"Now, it is equally certain that land, by being " divided, surveyed or laid out into small parcels, " tracts, or lots, and distinguished from other lands " by the additional appellation of 'town lots,' does " not, either in legal contemplation or in fact, " change its original character or quality, or lose " its original and still legal and appropriate name, " but remains of the same genus or class of prop- " erty to which it belonged before it was so di- " vided, or had applied to it the additional name " or designation, 'town lots.'"

In the *Exchange Bank of Columbus* vs. *Hines* (3 Ohio St. R., 15), it is said that "Taxing by a uniform rule requires uniformity, not only in the *rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation.* Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform over all the State; if a county, town or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to *all property* subject to taxation, so that all property may be taxed alike equally—which is taxing by a uniform rule."

"A tax is equal and uniform which reaches and "bears with the like burden upon all the property "within the given district, county, etc. It bears "the like burden when the *valuation of each "parcel is ascertained in the same mode*—the "mode prescribed by law—and when it is subject "to the same rate of taxation as other property "within the district, county, etc."

People vs. *Whyler*, 41 Cal., 355.

NO APPEAL TO LOCAL BOARDS.

That there is no appeal to local boards of equalization has been determined by the Supreme Court of California.

State Board of Equalization vs. *Sacramento Co.*, Sup. Ct., Cal. (Appendix III.)

PROCEEDING WITHOUT NOTICE.

The objection that the proceedings to fix the liability of petitioner are all had without notice will be considered under the next point.

B.

THE PROVISIONS OF THE STATE CONSTITUTION WHICH PROVIDES FOR THE ASSESSMENT OF THE PROPERTY OF RAILROAD COMPANIES OPERATING IN TWO OR MORE COUNTIES, IF ENFORCED, WOULD DEPRIVE SUCH COMPANIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 1 of Article XIV of the Federal Constitution declares: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

"Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

This is the mandate of the Federal Constitution. Let us try the provisions of the Constitution of California relating to revenue, by this supreme rule:

GENERAL LAW.	SPECIAL.
All property in this State shall be taxed in *proportion* to its value. (Art. XIII, sec. 1.)	The franchise, etc., of all railroads operated in more than one county in this State shall be assessed * * at their *actual* value. (Art. XIII, sec. 10.)

The proportions to value are "to be ascertained as provided by law." (Art. XIII, sec. 1.)	The value of franchises, etc., shall be ascertained by the "State Board of Equalization." (Art. XIII, sec. 10.)
No local or special law shall be made "for the assessment or collection of taxes." (Art. IV, sec. 25, sub. 10.)	Franchises, etc., shall be assessed under a special law. (Art. XIII, sec. 10.)
No person shall be deprived of * * property without due process of law. (Art. I, sec. 13.)	The franchises, etc., of railroads operated in more than one county may be taken without due process of law, or in other words, the liability of their owners may be fixed without notice or an opportunity to be heard. (Art. XIII, sec. 10.)
All persons may appeal from the Assessor to the local Board of Equalization. (Art. XIII, sec. 9.)	The owners of railroads operated in two or more counties shall not appeal to the local board of equalization. (Art. XIII, sec. 9.) See *People* vs. *Sacramento County*, (Appendix, 111.)
All property shall be assessed in the county in which it is situated. (Art. XIII, sec. 10.)	Franchises, etc., of railroads operated in more than one county shall not be assessed in the county in which they are situated. (Art. XIII, sec. 10.)
All property shall be assessed in the manner prescribed by law. (Art. XIII, sec. 10.)	Franchises, etc., of railroads operated in more than one county shall not be assessed in the manner prescribed by law, but shall be assessed in the manner prescribed by the State Board of Equalization. (Art XIII, sec. 10.)

The law which prescribes the manner of assessment and the rules of evidence and notice must be made by the Legislature, and must be uniform in their operation. (Art. IV, sec. 25, sub. 10; Art. 1, sec. 12.) The rules which this law prescribes must be predetermined. (Cooley on Constitutional Limitations, 4th Ed. T. P. 110, S. P. 91.)

The law which prescribe the manner of assessment of franchises, etc., of railroads operated in more than one county, and the rules of evidence relating thereto must be made by the State Board of Equalization, they need not be uniform in their operation. A new rule can be adopted for each case. These rules need not be predetermined. It is at the pleasure of the Board to require notice or not. (Argument of Atty-Gen. in S. F. & N. P. R. R. *vs.* State Board of Equalization, p. 11, hereinbefore cited.)

The owners of railroad property operated in more than one county are denied any protection from the laws, which

1. Require that property shall be taxed in *proportion* to its value.

2. Require such proportions to be ascertained by a general law.

3. Require that, before liability is fixed, an opportunity to be heard must be given.

4. Give an appeal from the assessor to another tribunal.

6. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property; and

7. Which prescribe the mode and manner of the assessment.

Each of which laws go to to the very essence of the taxing power.

No such discriminations have ever been attempted in any State. It is true that in some States laws exist for the ascertainment of the value of railroad property by tribunals differently constituted from the tribunals which ascertain the values of other property. But such tribunals have jurisdiction over *all railroad* property. They must proceed upon notice. The manner of their proceeding is regulated by laws analogous to the laws governing other tribunals exercising like powers—by laws which throw around the owners of such property every protection which the laws give to the owners of other kinds of property.

DUE PROCESS OF LAW.

In *ex parte Denis Kearney* (55 Cal., 21), the Supreme Court of California quotes with approval the language of Campbell, J., in *Jackson* vs. *The People*, (9 Mich., 111,) that "the Constitution, in apportioning the judicial power AS WELL AS IN AFFIRMING THE IMMUNITY OF LIFE, LIBERTY AND PROPERTY, HAS ALWAYS BEEN UNDERSTOOD TO GUARANTEE TO EACH CITIZEN THE RIGHT TO HAVE HIS TITLE TO PROPERTY AND OTHER LEGAL PRIVILEGES DETERMINED BY THE GENERAL TRIBUNALS OF THE STATE."

Says Earl, Justice, in the well reasoned case of *Stuart* vs. *Palmer* (74 N. Y., 191):

"It is difficult to define with precision the exact meaning and scope of the phrase, 'due process of law.' Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice MILLER

of the United States Supreme Court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (*Davidson* vs. *Board of Administrators of New Orleans*, 17 Albany Law Journal, 223). It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We can not conceive of due process of law without this. In his argument in the *Dartmouth College Case* (4 Wheat., 519), Webster defined 'due proces of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.' Mr. Justice EDWARDS in *Westervelt* vs. *Gregg* (12 N. Y., 209) defines it as follows: 'Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' Judge Cooley in his work on Constitutional Limitations, at page 355, after saying that 'due process of law' is not confined to ordinary judicial proceedings but extends to all cases where property is sought to be taken or interfered with, says, that 'due process of law in each particular case means such an exertion of the powers of government, as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.' It has always been the general rule in this country, in every system of assessment and taxation to give the person to be assessed an opportunity to be heard at

some stage of the proceeding. That 'due process of law' requires this, has been quite uniformly recognized.

"In *Butler* vs. *Sup'rs of Saginaw* (26 Mich., 22), where a tax had been imposed for building drains, Judge COOLEY says: 'It is not the province of any mere legislative direction to impose pecuniary burdens upon the people. The power to tax is indeed plenary; but taxation implies public interest, and in cases like these now in question it also implies proceedings *in pais* in some of which the taxpayers have a right to take part and be heard. Any attempt to lay the burden in disregard of these principles must necessarily be inoperative.' In *Patten* vs. *Green* (13 Cal., 325,) BALDWIN, J., says: 'We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power.' In *Philadelphia* vs. *Miller* (49 Penn., 440), AGNEW, J., speaking of taxation, says: 'Notice or at least the means of knowledge is an essential element of every just proceeding of which affects rights of persons or property.' In *Matter of Trustees of N. Y. Prot. Epis. Public School* (31 N. Y., 574), Judge DENIO says: 'It is manifestly proper that the taxpayers should have notice of the imposition proposed to be laid upon them, and an opportunity for making suggestions and explanations to the proper administrative board or office.' In *Ireland* vs. *City of Rochester* (51 Barb., 414), Judge JAMES C. SMITH, speaking of the imposition of assessments, says: 'It is in the nature of a judicial proceeding against them, and its effect is to take their property for public use.

* * * It is a plain principle of justice applicable to all judicial proceedings, that no person should be condemned, or shall suffer judgment against him without an opportunity to be heard;' and he says that an Act assessing 'persons without notice transcends the power of the Legislature, and is itself void.' *In the Matter of Ford* (6 Lans., 92), Judge GILBERT says: That the duties of assessors in making assessments are of a judicial nature, and that 'it is a fundamental rule that in all judicial or *quasi* judicial proceedings, whereby the citizen may be deprived of his property, he shall have notice, and an opportunity of a hearing before the proceedings can become effectual.' That assessors act judicially. See, also, *Barhyte* vs. *Shepherd* (35 N. Y., 238), and *Clark* vs. *Norton* (49 N. Y., 243).

"In *Overing* vs. *Foote* (65 N. Y., 363), Mr. Commissioner REYNOLDS says: 'The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding to be had against his property, and that in some form he may be heard, if wrong is apprehended, before any portion of his estate is seized for the support of government; and I think all our laws for the assessment of property for the purpose of taxation are founded upon this notion of justice.' In *Davidson's Case* in the Supreme Court of the United States above referred to, the doctrine that the citizen is entitled to due process of law in the imposition of assessments, is distinctly recognized. In that case, an assessment upon the real estate of the plaintiff in error in the city of New Orleans for draining the swamps of that city was resisted in the State Courts and was brought by a writ of error to the United States Supreme Court, on the ground that the proceeding deprived

the owner of his property without due process of law, and the Court refused to interfere with the assessment on the ground that the party assessed had notice and an opportunity to appear before a proper tribunal and contest. Mr. Justice BRADLEY, writing one of the opinions, says: 'In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and if found to be suitable or admissible in a special case it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.' In *Murray's Lessee* vs. *Hoboken Land and Improvement Co.* (18 How. [U. S.], 272), it was held that the provision as to 'due process of law' was a restraint on the legislative as well as the executive and judicial powers of the government. Judge COOLEY in his valuable work on Taxation, at page 265, says: 'In such proceedings therefore it must be a matter of the utmost importance to the person assessed, that he should have some opportunity to be heard, before the charge is fully established against him; and it would seem to be a dictate of strict justice that the law should make reasonable provisions to secure him as far as may be against partiality, malice or oppression;' and on page 266 he says: 'We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is due process of law for these cases, and it is not to be assumed that constitutional provisions carefully framed for the protection of property, were intended, or could be construed to sanction legislation under which officers might secretly assess

one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment.'

"While it may be said that there is no authority directly in point, yet, as has been shown, there is much judicial expression in favor of the proposition I am endeavoring to maintain. The cases must have been extremely rare in this country where assessments have been imposed without notice or an opportunity to be heard, and hence the application of 'due process of law' to the subject of assessments and taxation has not been much discussed. The case nearest in point is *Davidson's Case*. That as has been seen was a case of assessment, and the United States Supreme Court had jurisdiction of it only bacause it involved the constitutional provision as to 'due process of law.' If the citizen in the case of assessments is not entitled to the protection of this constitutional provision, then the Court would have dismissed that case on that ground, but it considered the case upon the merits and decided that there was due process of law.

"No case it is believed can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien; but as in

this case against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment-debtor is deprived of his by the judgment."

Says Earl, J., in *Stuart* vs. *Palmer*: "I am of the opinion that the Constitution sanctions no law imposing such an assessment, WITHOUT NOTICE TO, AND A HEARING OR AN OPPORTUNITY OF A HEARING BY THE OWNERS OF THE PROPERTY TO BE ASSESSED. It is not enough that the owners may by chance have notice, or that they as matter of favor have a hearing. THE LAW MUST REQUIRE NOTICE TO THEM AND GIVE THEM A RIGHT TO A HEARING AND AN OPPORTUNITY TO BE HEARD. It matters not upon the question of the constitutionality of such a law that the assessmeat has, *in fact*, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done."

Let us at this point apply this rule to the case in hand. It has been held by the Supreme Court of California (*Board of Equalization* vs. *Supervisors of Sacramento County*, Appendix III), that section 10, Art. XIII, is self-executing. That it gives full and ample power to the State Board of Equalization. Then, under the rule given in *Stuart* vs. *Palmer*, its constitutionality must be determined by looking into the section and determining whether it "requires notice," or "gives a right to a hearing." If it does not, then it falls, even though the Legislature had authorized notice, or the board by rules had given the right to a hearing. For the constitutionality of the section must be tested, "NOT BY WHAT HAS BEEN DONE UNDER IT, BUT BY WHAT MAY, BY ITS AUTHORITY, BE DONE."

Again says Earl, Justice, in the same opinion: "The Legislature may prescribe the kind of notice * * * but it cannot dispense with all notice."

The law (sec. 10, Art. XIII,) under which the State board claims to act, does not provide for notice. This is fatal; but if it were not, and the law assailed could be helped out by notice given under a rule of the board, yet no such rule has been adopted. Hence, in no event, if *Stuart* vs. *Palmer* is good law, can the action of the State board be upheld.

The case of *Stuart* vs. *Palmer*, is approved by the Supreme Court of California in *Milligan* vs. *Smith*, (Oct. 26th, 1881, Appendix III).

"An assessment is a *tax* differing from other taxes in that it need not be levied upon the *ad valorem* principle." (McKinstry, J., in *People* vs. *Lynch*, 51 Cal., 20.)

In *Milligan* vs. *Smith*, Mr. Justice McKee says:

"For it is a principle which underlies all forms of government by law, that a citizen shall not be deprived of life, liberty, or property, without due process of law. THE LEGISLATURE HAS NO POWER TO TAKE AWAY A MAN'S PROPERTY, NOR CAN IT AUTHORIZE ITS AGENTS TO DO SO, WITHOUT FIRST PROVIDING FOR PERSONAL NOTICE TO BE GIVEN TO HIM, AND FOR A FULL OPPORTUNITY OF TIME AND PLACE AND TRIBUNAL TO BE HEARD IN DEFENSE OF HIS RIGHTS. THIS CONSTITUTIONAL GUARANTY IS NOT CONFINED TO JUDICIAL PROCEEDINGS, BUT EXTENDS TO EVERY CASE IN WHICH A CITIZEN MAY BE

DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WHETHER THE PROCEEDINC BE JUDICIAL, ADMINISTRATIVE OR EXECUTIVE IN ITS NATURE."

And Mr. Justice McKinstry says:

"I concur. To what has been said, I add: In my opinion the statute provides NO NOTICE OR PROCESS BY MEANS OF WHICH THE PROPERTY-OWNERS CAN BE SUBJECTED TO THE JUDGMENT OF THE COUNTY COURT. THE ACT IS THEREFORE VOID." (*Stuart* vs. *Palmer*, 74 N. Y., 183; *Murray's Lessees* vs. *Hoboken Land and Im. Co.*, 18 How. U. S. 272; Cooley on Tax., 266).

A self-executing clause of a State Constitution providing for the assessment of property—a clause complete in itself, and under the authority of which the power can be exercised without legislation, must be void unless it contains provisions which require notice and give the right to a hearing. If, under the power conferred, the liability of the property-owner *might be* fixed without notice, then, on the authority of *Stuart* vs. *Palmer*, and *Milligan* vs. *Smith*, the clause is void.

No action of the Legislature nor of the board upon which the authority is conferred, can in that event help out the constitutional provision. It must be tried by itself—must stand or fall upon its own provisions.

What the Legislature are forbidden to do by the provisions of the State Constitution considered in *Mulligan* vs. *Smith*, the State is forbidden to do by the 14th Amendment to the Federal Constitution.

The masterly and comprehensive definition of phrase, "law of the land," by Daniel Webster is, perhaps, the true one, and sustained with more unanimity by the authorities than any other: "By the *law of the land* is most clearly intended the *general* law—a law which hears before it condemns—which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of *general rules* which govern society."

Cooley on Constitutional Limitations, 3d Ed., p. 449.

"Every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit *to conditions not imposed upon his fellows*, as a means of obtaining it."

The terms *law of the land*, says Chief Justice Hemphill in *James* vs. *Reynolds*, 2d Texas, 251, "have often been construed and somewhat variously defined. They are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals, or classes of individuals."

Upon this topic Judge Cooley, after a review of the authorities, remarks: "As to the safeguard law of the land in tax proceedings, neither the practice of governments nor the decisions of Courts warrant us in saying that it includes a judicial finding of delinquency before a sale can be made. *It means*, beyond any question, regular

and orderly proceedings, under the *general law*, by the proper department of government; and means nothing more."

Cooley on Taxation, Note 2, pp. 40 and 41.

GENERAL LAWS.

This brings us to the consideration of what a general law is.

In Potter's Dwarris, the division of statutes noticed is that of general or public acts, and such as are special or private, and it is added the most comprehensive, if not the most precise definition, is that given by Dwarris: "That public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals, or particular classes of men." Potter's Dwarris, 52.

"General laws are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraint."

Sedgwick on Stat. & Con. Law., p. 30.

"The general description of public acts is that they relate to or concern the interests of the public at large, or relate to a general *genus* in relation to things, and private acts relate to private individuals, or an individual only, or which concern a particular *species* of such general *genus* or things."

Smith on C. Const., sec. 795, p. 913.

The rule "requires that any general law must be as broad as the subject matter to which it relates."

Desmond vs. *Dunn*, (McClure Charter,) 55 Cal., 252.

"It may be true that it (the law) bears equally upon all to whom it is applicable, but this does not make it a general law, for if that was the test there could be no special laws." (McKinstry, J., in *ex parte* Westerfield, Supreme Court of California, August 20th, 1880, 55 Cal., 550.)

In *Van Zandt* vs. *Waddell* (2 Yerger, Tenn., 268), it is said, "that a law which is partial in its operation, intending to affect particular individuals alone, or to deprive them of the benefit of the general laws, is inhibited by the Constitution, and is void." The learned Judge Catron, in the same case, remarks, "that a partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general and public laws of the land, is unconstitutional and void, we do not doubt." And again: "The right to life, liberty and property of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land in similar circumstances, and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies that lead to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

The provision of the Constitution of the State of California which we have been considering, and to which we object, is one which does provide, in effect, not that all corporate bodies, but that certain corporate bodies shall be governed by one rule, while the mass of the community, who made that Constitution, shall be governed by another.

Justice Catron, proceeding, says: "The idea of a people, through their representatives, making laws whereby are swept away the life, liberty and property of *one* or of a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country; and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our Constitution."

The provision of the Constitution of California to which we object is, in effect, that the valuation of the property of a few corporations shall be made by a State Board of Equalization, which may assemble at any time or place within the State; may act without evidence, without notice; and from the action of which there is no appeal. This makes a case within the very reason of the rule as it is expounded by Judge Catron.

Of all the members of that Constitutional Convention it is not to be presumed that there was a single one who would have been willing to be bound by such a rule applied to his own property; and of all the constituents of those members it may be said without extravagance, that not one would have assented to his property being valued by such a tribunal. We have here, then, in the form of a constitutional provision a law, under

which might be swept away the property of all the corporations or persons affected, but by which neither the representatives of the people who framed the provision nor the constituents would be willing to be bound. We have here a provision made applicable to the property of the petitioners, containing a rule of action such as Justice Catron characterizes as "too odious to be tolerated in any government where freedom has a name."

Wally's Heirs vs. *Kennedy*, 2 Yerg., 554, was an act of ejectment brought by the heirs of Wally against the defendant, claiming the land in controversy as a reservation, by virtue of the treaties of 1817 and 1819, with the Cherokees. The material question involved was this: On the trial below, the defendant proved that the suit was prosecuted for the benefit of another, and not the lessors of the plaintiff, who had contracted to convey their interest before the suit was brought.

On this point the Court charged the jury, "that if they believed the lessors of the plaintiff had sold their interest in the land in dispute, they must find a verdict for the defendant." The jury accordingly found a verdict for the defendant. The charge of the Circuit Court was grounded on the Act of 1827, ch. 39, passed December 6th of that year. A suit was commenced on the 27th of August, 1827. The Act provides, among other things, that the defendant, on the trial of the cause, might prove by witnesses that the suit was instituted or prosecuted, in whole or in part, on a contingent interest, or in trust for any other person than the one in whose name the suit was

brought, and if the fact should so prove on examination, it would operate as a bar to the recovery of the plaintiff. Judge Catron delivered the opinion of the Court, holding that this Act was a partial law, that the treaty between the United States and the Cherokee Nation of Indians secured to the reservees the right of citizenship, and that, of course, in 1827 they held the same relation to the body politic, and were entitled to the same measure of constitutional protection as the citizens of Tennessee, and he inquires, "Does that part of the Act of 1827, which declares that the suit shall be barred if the defendant prove it was prosecuted in trust for another, violate the Constitution?" and, answering this inquiry, proceeds: "By this—the Constitution—it is declared that no free man shall be disseized of his freehold, or deprived of his property, but by the judgment of his peers or the law of the land. What is the 'law of the land?' This Court, on two occasions, and upon the most mature consideration, has declared the clause 'law of the land' means a general, public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and ever partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." And here he quotes with approval from his own opinion in the case of *Van Zandt* vs. *Waddell.*

The objection to the Act in *Waddell's Heirs* vs. *Kennedy*, was that it was limited in its operation to a comparatively small section of the State,

and to a very few individuals, claiming a very small portion of the section of the country referred to.

"The Act," says the learned Judge, "was intended to drive from the Courts of justice a few odious individuals, who, it was supposed, had speculated upon the ignorance and necessities of the Indian reservees, and fraudulently obtained their claims for trifling considerations, and were corruptly obtaining evidence to establish rights to reserves, where the Indians, in fact, never had any, to the prejudice of purchasers from the State. If the supposed facts did exist, there was good cause for public indignation, but none for a violation of the Constitution by the passage of a law affecting the rights of a few individuals, but by which the great body of the people, or the legislators themselves, were unwilling to be bound. The part of the Constitution referred to, was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our Government, exercise the legislative power."

The Court in *Wally's Heirs*, as we have observed, held the Act unconstitutional, because it was partial in its operation, applying to a comparatively small section of the State, and to but few individuals therein.

In *The State Bank* vs. *Cooper*, 2 Yerg., p. 599, an Act of the Legislature of Tennessee of 1829, ch., 95, directed a Court to be holden at Nashville, to consist of a Judge of the Supreme Court, a Chancellor and a Judge of the Circuit Court with power and authority, upon complaint by the bank, to hear and determine all causes against the officers

of the bank and their trustees, and against persons who might be overchecked, and therefore become defaulters to said bank. it will be seen that the Act of 1829 differs from the Act considered in *Wally's Heirs* in this respect. In the latter case, the Act referred to a small section of the State; while in the former, it refers to a portion of the people or corporations of the State.

Green, a Judge of the Supreme Court; Peck, a Judge of the Circuit Court, and Judge Kennedy, the persons referred to in the Act of 1825, and who were to hold the Court directed by that Act, in pursuance of the Act, at the appointed time, met at Nashville, organized and appointed their clerk. The bank, under the provisions of the Act, commenced the suit against Cooper. The defendants plead that Jacob Peck, Nathan Green and William E. Kennedy had no power or authority to hear, try and determine said complaint; nor have they jurisdiction thereof. And in support of this plea several constitutional grounds were taken, only one of which (the fifth) it is necessary here to take notice: that was, that the law was partial in its operation, and for that reason was not a law of the land. Each of the judges delivered an opinion, and all agree that the fifth point was well taken. An extract from the opinion of Judge Peck, p. 613, fairly presents the view taken by all of the judges: "Is the Act on its face partial in its provisions, and personal in its application, affording advantages to one side and withholding them from the other, by such provisions as are found not to apply to other portions of

the community, besides those specified in the Act? This is a delicate question. I am confident that the framers of the law did not intend that the Act should be subject even to such a suspicion, but times do arise when men are hurried into measures, which, on cool deliberation, they might themselves condemn. Putting intentions aside, what are the provisions of this Act? It provides that, touching a few individuals, the Court should, by summary process, call them before the judges, and fix, at pleasure, the time of their appearance; put interrogations to principals in bonds, hear testimony, adjudge and award execution against both them and their securities for breaches of trust, indebtedness and malfeasance in office. All this the judges are empowered to do by this Act, without regard to form or substance. * * * * The duty assigned to this Court is aside from the duty belonging to its members as judges; the Act relates to the few specially named in it; the rules by which we are to be governed are not those common to the rest of the community; the right of trial by jury is made discretionary, if not absolutely taken away by the Act, and the right of appeal is taken away in express terms. Under these circumstances is the law of the land likely to be afforded to the defendants? When I am acting under the Constitution of my country, and the equal distribution of rights becomes a question, I am not to forget that our ancestors knew, before the making of our Constitution, that when a Sidney was to be tried a Jeffries had to be selected. Weak and feeble as my walk may be in the station I occupy, it shall be my endeavor to move with even-handed justice. The franchises of the State might become dangerous engines in the hands of the crafty, if judges could be moulded to meet exigencies."

Now, it will be observed that the objection taken to the act involved in the *State Bank* vs. *Cooper* was, that touching a few individuals the Court should, by summary process, call them before the judges. The State Constitution provides in effect, that touching a few individuals, their rights and interests shall be determined by judges who are not even required to call the persons interested before them. Another objection taken before the Court in the Tennessee case was that the Act gave the judges power to fix, at pleasure, the time of the appearance of the persons to be affected. The Constitution of California goes further, because even the right of appearance at any time is not given. In the Tennessee case the Court was required to be governed by the rules of equity: under the State Constitution the Board of Equalization may act independently of all rules, save those of their own making. In Tennessee the Court was supreme in its own sphere of action, and from its judgment there could be no appeal: so it is said of State Board of Equalization. In the Tennessee case the rules by which the Court was to be governed were not those common to the rest of the community: so in this case. In the Tennessee case the right of trial by jury was discretionary: in this case there is no trial.

Considering the whole matter, and turning it as we may, the provisions of the State Constitution, which authorize the Board of Equalization to fix the value of the property of a few corporations, is more obnoxious to the Federal Consti-

ution than were the provisions of the Act of the State of Tennessee to a similar provision in the Constitution of that State.

To the three cases cited from Yerger, we earnestly call the special attention of this Court. They were decided after mature deliberation by able judges, and upon principles which are entirely applicable to the case at bar.

INTENT OF THE FRAMERS OF THE CONSTITUTION.

There was at the time of the adoption of the New Constitution but a few companies operating railroads in more than one county in the State of California. The number has not since increased. The circumstances attending the adoption of section 10 of Art. XIII of that Constitution being matters of common notoriety, are therefore supposed to be within the knowledge of the Courts. These circumstances all indicate that it was the intention of the framers of that section to single out these few companies, and apply to them a rule which they would not have thought of applying to the community at large.

No express words that could have been used in the Constitution could so limit the operation of the section in question more absolutely and definitely to such companies than those employed. The obligations of the Federal Constitution can not be so evaded.

Devine vs. *Cook County*, 84 Ills., 592.

The section in question may masquerade in the garb of a general rule, but the disguise is too transparent to deceive for a moment the eye of justice. Courts clothed with power to enforce the sanctions of the Constitution will not hesitate to penetrate the shadow of the words, and seize and do judgment upon the substance.

IN CONCLUSION, ON THIS POINT.

Rights are being attempted to be wrested from the petitioner by a summary *ex parte* proceeding unknown to the laws of the land. Our language might be searched in vain for more appropriate words to close upon this point petitioner's appeal to this Court than those uttered by Judge Coulter in Ervine's Appeal (16 Penn. St., 268):

"But these parties stand here under that irremovable decree of the Constitution, that for any injury done an individual in his lands or goods, he shall have remedy by due course of law, in the Commonwealth's Courts, where right and justice shall be administered. This Court have so determined in *Brown* vs *Hummel*, 6 Barr. In closing this opinion I may say, that when, in the exercise of proper legislative powers, general laws are enacted which bear or may bear on the whole community, if they are unjust and against the spirit of the Constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation.

"But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice at the instigation of an interested party, who is to stand up for them,

thus isolated from the mass in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the Courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and, in the language of the Chief Justice in *Greenough* vs. *Greenough*, 1 Jones, confesses itself 'too weak to stand against the antagonism of the legislature and the bar,' one independent, co-ordinate branch of the Government will become the subservient handmaid of another, and a quiet, insidious revolution will be effected in the administration of the Government, whilst its form on paper remains the same."

II.

SECTION 3664 OF THE ACT OF MARCH 23D, 1880 (AMENDMENTS TO CODES 1880), IS INOPERATIVE, BECAUSE THE TITLE OF THE ACT DOES NOT DESIGNATE THE CODE TO WHICH THE SECTION IS TO BE ADDED, NOR DOES IT EXPRESS THE SUBJECT THEREOF.

The title of the Act is as follows: "An Act to amend sections 3607, 3617, 3627, 3628, 3629, 3630, 3634, 3640, 3643, 3650, 3651, 3652, 3663, 3673, 3678, 3679, 3717, 3730, 3752, 3756, 3839, 3861, and to repeal sections 3680 and 3887 of an Act entitled 'An Act to establish a Political Code,' approved March twelfth, eighteen hundred and seventy-two, relating to revenue, and to add two new sections, numbered 3664 and 3665." (Amendments to Codes, p. 13.)

Section 3664 is the only section of the Act which pertains to the matter under discussion.

We claim that section to be inoperative, because the subject thereof was not expressed in its title, and that the Act, so far as said section is concerned, is in violation of section 24, Article IV, of the Constitution of California, which provides that "every Act shall embrace but one subject, which

The case of *Leonard* vs. *January* was decided by the Supreme Court of California, September 16, 1880. The decision is as follows:

IN BANK.

[Filed September 16, 1880.]

BY THE COURT—THORNTON, J., AND MYRICK, J., DISSENTING.

LEONARD *vs.* JANUARY. } No. 7,334.

We are of the opinion that the Act of the Legislature, entitled, "An Act to amend sections 4,000, 4,003, 4,004, 4,006, 4,022, 4,023, 4,024, 4,025, 4,026, 4,028, 4,029, 4,046, 4,087, 4,103, 4,104, 4,109, 4,115, 4,116, 4,119, 4,165, 4,192, 4,204, 4,221, 4,256, 4,314, 4,328, 4,329, 4,344, and add two sections to be known as sections 4,292 and 4,348, and repeal sections 4,005, 4,105, 4,106, and ten, 4,111, 4,134, 4,304, to establish a system of county governments," approved April 27, 1880, is in conflict with the Constitution of the State, and is, therefore, void. Writ denied.

An opinion will be filed at an early day.

(Morrison, C. J., not having heard the argument, took no part in the decision.)

The opinion mentioned in the decision has never been filed.

Court, *in banc*, held the Act to be void, as we are advised, upon the ground that the title of it did

thus isolated from the mass in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the Courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and, in the language of the Chief Justice in *Greenough* vs. *Greenough*, 1 Jones, confesses itself 'too weak to stand against the antagonism of the legislature and the bar,' one independent, co-ordinate branch of the Government will become the subservient ha
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Section 3664 is the only section of the Act which pertains to the matter under discussion.

We claim that section to be inoperative, because the subject thereof was not expressed in its title, and that the Act, so far as said section is concerned, is in violation of section 24, Article IV, of the Constitution of California, which provides that "every Act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an Act which shall not be expressed in its title, such Act shall be void only as to so much thereof as shall not be expressed in its title."

The title, in this respect, is to add two new sections—numbers 3664 and 3665. To what Code these sections are to be added is not stated in the title, nor is the subject-matter thereof expressed in the title. The title of the Act in question, so far as section 3664 is concerned, is substantially "An Act to add a new section, No. 3664," and certainly does not express nor indicate the subject to which the proposed legislation refers. This is in violation of the principle and policy of the section of the Constitution cited. It seems to us to be a much stronger case than the case of *Leonard* vs. *January* (September 16th, 1880).

In *Leonard* vs. *January*, the Act declared void was an Act to amend several sections, naming them, and to add new sections, naming them, "to establish a system of County Governments." The Court, *in banc*, held the Act to be void, as we are advised, upon the ground that the title of it did

not specify, as to the amendments, that they were to be amendments to the Political Code, and did not, in any manner, indicate the subject-matter of the legislation.

In the case of *Earll* vs. *The Board of Education* (55 Cal., 489), the Court, referring to the "Traylor" Act, say: "It is in no sense an amendment to the Political Code. It is entitled 'An Act to add a new section to the Political Code, to be known as section 1618,'" etc., and its first section is "A new section is hereby added to the said Political Code, to be known and numbered as section 1688," etc. If an amendment, what does it amend—the Political Code, or some part or section of it? If treated as an amendment at all, it is in direct conflict with section 24 of Article IX of the Constitution, which declares that no law shall be revised or amended by reference to its title, but in such case the Act revised or section amended shall be re-enacted and published at length as revised and amended. There is no pretense here that the law, whatever it is, supposed to have been amended by the Traylor Act, was re-enacted and published at length as amended, as is expressly required by the Constitution. If this law is to be upheld as an amendment, it seems to us it would be opening the door to the accomplishment, by indirection, of many of the evils it was manifestly intended, by the framers of the Constitution, directly to prevent, and thus to wipe out some of its most salutary provisions. To maintain the Constitution as it is, is our first duty, and whenever it

is encroached upon, we are bound to assert its supremacy. In view of these decisions, it would be simply to disregard the known use of language and to set at nought the letter, as well as the policy, of the constitutional provision in question, to hold that a statute "adding two new sections to the Political Code" furnishes any expression of the subject of those two new sections.

The title of the Act considered by the Supreme Court of California in *Bernard* vs. *The University* (decided January 28th, 1881), was "*An Act to add five new sections to the Political Code, providing for funding and refunding county indebtedness.*" The distinction between such a title and the title under consideration is obvious. The subject of one is stated to be the adding of "five new sections to the Political Code, providing for funding and refunding county indebtedness;" the subject of the other is stated to be the adding of two new sections, number 3664 and 3665, but to what Code the new sections are to be added is not stated, nor is there any intimation of the matters to which the proposed new sections relate.

If the case of *Leonard* vs. *January* is to be followed, it would seem clear that the sections in question must fall. The Act considered in the Leonard case amended and added sections "relating to County Government." The only vice in the title was that the title did not specify the Code in which the original sections were contained nor the Code to which the new sections were to be added. It did give the subject to which they

related—viz.: "County Government." In the title of the Act under consideration, neither the Code to which the new sections are to be added, nor the subject, is stated.

In this connection, it may be well to refer to the decisions of the Courts of States having constitutional provisions of like character:

Rader vs. *The Township of Union*, 39 New Jersey Law, 515.
Durkee vs. *City of Jamesville*, 26 Wis., 700.
Gaskin vs. *Meek*, 42 N. Y., 188.
People vs. *Commissioners of Highways*, 63 Bab., 72.
People vs. *Hills*, 35 N. Y., 350.
People vs. *O'Brien*, 88 N. Y., 195.
People vs. *Supervisors*, 43 N. Y., 22.
State vs. *Silver*, 9 Nev., 231.
Green Castle Southern Turnpike Co. vs. *The State*, 28 Ind., 384.
Falconer vs. *Robinson*, 46 Ala., 337.

In 1872, the Legislature of the State of California adopted the Code system and enacted four Codes which are still in force. These Codes embrace almost every subject within the legislative power of the State, and contain about twelve thousand sections. An Act entitled "An Act to add a new section to the Code," without stating the subject-matter of the section, or without referring to the Code to which the section was to be added, would give about as intelligent an idea of the subject-matter of the contemplated enactment

as if the title was "An Act to add to the laws of California."

To the support of our position upon the unconstitutionality of the section in question, we may bring the judgment of the legislative department of the Government. In the statutes of 1881, page 82, is an Act entitled "An Act to amend an Act entitled 'An Act to establish a Political Code,' approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to assessments of railroads and other property by the State Board of Equalization and County Assessors, for the purpose of taxation."

This Act purports to have been approved March 14th, 1881. It treats the enactment of 1880, so far as the same relates to sections 3664 and 3665, as a nullity. It purports not to amend the sections in question, but to enact new sections, as if no such sections had ever been enacted. This attempted legislation of 1881 was had in view of the general opinion that the Act of 1880, so far as it related to railroad assessments, was void.

III.

The Remedy.

The tax in this case is illegal. The illegality results from a provision of the State Constitution (Sec. 10, Art. XIII) designed to, and which does,

discriminate injuriously against a class of persons and a species of property. In such a case, the rule which requires one who seeks to enjoin the collection to pay or tender what is lawfully due, cannot have any application.

National Bank vs. *Kimball*, 103 U. S., 735.

Respectfully submitted,

HARVEY S. BROWN,
Of Counsel for Appellant.

APPENDIX I.

Extracts from State Constitution.

Art. I. Sec. 11. All laws of a general nature shall have a uniform operation.

Sec. 13. In criminal prosecutions, in any Court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the Court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.

Sec. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities, which, upon the same terms, shall not be granted to all citizens.

Art. IV. Sec. 25. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * *

Tenth—For the assessment or collection of taxes.

ART. XIII. SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municpal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State.

SEC. 2. Land and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value.

SEC. 3. Every tract of land containing more than six hundred and forty acres, and which has been sectionized by the United States Government, shall be assessed, for the purposes of taxation, by sections or fractions of sections. The Legislature shall provide by law for the assessment, in small tracts, of all lands not sectionized by the United States Government.

SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad

and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

SEC. 5. Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void.

SEC. 6. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party.

SEC. 7. The Legislature shall have the power to provide by law for the payment of all taxes on real property by installments.

SEC. 8. The Legislature shall by law require each taxpayer in this State to make and deliver

to the County Assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at twelve o'clock meridian, on the first Monday of March.

SEC. 9. A State Board of Equalization, consisting of one member from each congressional district, in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purpose of taxation. The Controller of State shall be ex-officio a member of the board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the State board may prescribe, as to the action of the State board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll.

SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner pre-

scribed by law. The franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts.

APPENDIX II.

State Statutes Cited.

"An Act to amend sections 3607, 3617, 3627, 3628, 3629, 3630, 3634, 3640, 3643, 3650, 3651, 3652, 3663, 3673, 3678, 3679, 3717, 3730, 3752, 3756, 3839, 3861, and to repeal sections 3680 and 3887 of an Act entitled 'An Act to establish a Political Code,' approved March twelfth, eighteen hundred and seventy-two, relating to revenue, and to add two new sections, numbered 3664 and 3665."

Amendments to Codes, 1880, p. 13.

Sec. 3664. On or before the first Monday in May, in each year, the State Board of Equalization shall assess the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county. The President, Secretary, Cashier, or Managing Agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall

furnish said board, on or before the first Monday of April, in each year, a statement, signed and sworn to by one of such officers, showing in detail, for the year ending on the first Monday in March in such year:

(*a*) The whole number of miles owned, operated, or leased in the State by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

(*b*) Also a detailed statement of the number and value thereof, of engines, passenger, mail, express, baggage, freight, and other cars or property used in operating or repairing such railway in this State; and on railways which are part of lines extending beyond the limits of this State, the return shall show the actual amount of rolling stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling stock, the annual gross earnings of the entire railway and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all property designated hereafter in this section, and such other facts as the State Board of Equalization may, in writing, require.

If such officers fail to make such statement, said Board of Equalization shall proceed to assess the property of the corpoaations so failing; the valuation fixed by them shall be final and conclusive. The said property shall be assessed at its actual cash value. The assessment shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts and rolling stock. The depots, station grounds, shops, buildings, and gravel beds, shall be assessed by the Assessor of the county where situated, as other property. On

or before the fifteenth day of May, in each year, said board shall transmit to the County Assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole property named in this section. Said statement shall be entered on the assessment roll of the county. At the first meeting of the Board of Supervisors after such statement is received by the County Assessor, they shall make, and cause to be entered in the proper record book, an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district, in their county, through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the Clerk of the Board of Supervisors shall transmit a copy of each order or equalization to the city council or trustees of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxing districts through which such railway runs. The taxes on said property for State and county purposes, after collection by the County Collector, shall be paid over to the County Treasurer, as other taxes. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes, as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxing districts.

Statutes 1881, p. 82.

An Act to amend an Act entitled "An Act to establish a Political Code," approved March 12, 1872, by adding thereto two new sections, to be known as Sections 3664 and 3665, relating to assessments of railroads and other property by the State Board of Equalization and County Assessors, for the purpose of taxation.

[Approved March 14th, 1881.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The following section is added to the said Act, known as the Political Code, to be known as section three thousand six hundred and sixty-four of said Code:

3664. On or before the first Monday in May in each year, the State Board of Equalization shall assess the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county. The President, Secretary, Cashier, or menaging agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish said board, on or before the first Monday of April in each year, a statement signed and sworn to by one of such officers, showing in detail for the year ending on the first Monday in March in such year:

(*a*) The whole number of miles of railway owned, operated, or leased in the State by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

(*b*) Also, a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight, and other cars or property

used in operating or repairing such railway in this State, and on railways which are parts of lines extending beyond the limits of this State. The return shall show the actual amount of rolling stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require. If such officer or officers so designated shall fail to make and furnish such statement, said Board of Equalization shall fix the value of and proceed to assess the property of the corporations so failing; the valuation fixed by them shall be final and conclusive. The said property shall be assessed at its actual value. Assessment shall be made upon the entire railway within the State, and shall include the right of way, roadbed, track, bridges, culverts, and rolling stock. The depots, station grounds, shops, buildings, and gravel beds shall be assessed by the Assessor of the county where situated, as other property. On or before the fifteenth day of May in each year, said board shall transmit to the County Assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identificaltion, and the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within this State.

Said statement shall be entered on the assessment roll of the county. At the first meeting of the Board of Supervisors after such statement is received by the County Assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the Clerk of the board of Supervisors shall transmit a copy of each order or equalization to the City Council or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property, for State and County purposes, after collection by the County Collector, shall be paid over to the County Treasurer as other taxes. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes, as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts respectively. Any person dissatisfied with an assessment made by said Board of Equalization against his or its property, may, within five days after such assessment is made and entered of record on the books of said board, by written petition apply to said board to have the same corrected in any particular. Said petiiton must state the grounds of objection to such assessment, and must be filed with the Clerk of the board. The board must fix a time for hearing said petition, which must be not less than five nor more than

ten days from the time the same is filed, and must, upon such hearing, receive such proofs as may be offered by the petitioner, or by the Attorney-General, or any other person appearing against such petition, and such other proofs as, in the judgment of the board, bear upon the question at issue. By an order of the board, or upon the demand of the petitioner, the proofs shall be reduced to writing by a phonographic reporter. If the board do not order the proofs to be reduced to writing by such reporter, but the same is done upon the demand of the petitioner, the petitioner must pay the expenses thereof. After hearing such proofs, the board shall, within ten days, determine, in writing, upon the matters involved in the petition and proofs, and may alter, in conformity with such determination, the assessment complained of. Any person feeling aggrieved at such determination who shall pay the tax upon the assessment complained of, and may, within ten days after such payment, bring an action in the Superior Court of the county in which the tax, or any part thereof, has been paid, against the Board of Equalization, and in the complaint may allege any fact averred in his petition filed with said board, showing the illegality of such tax in whole or in part, or that the property in whole or in part was assessed for more than its actual value. A copy of the complaint must, within thirty days after it has been filed, be served upon the Chairman or Clerk of said board, and said board shall have thirty days in which to answer or demur to the same. At the time the board answers or demurs, it may demand that the suit be tried in the Superior Court of Sacramento County. The provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials, and appeals shall be applicable to the proceeding herein provided for, and the testimony taken before the Board of

Equalization may be read in evidence, and in such proceeding the Court shall have power to determine the matters involved in the issue, and in making such determination may ascertain whether the property was taxed or assessed in proportion to its value, and if the determination is in favor of the petitioner, as to the illegality of the tax in whole or in part in excess of its actual value, it shall, by its judgment, direct the return of the tax paid, or of such part thereof as may have been illegally exacted, or exacted in excess of the actual value of the property. Upon presentation of a certified copy of such final judgment to the Controller, he shall draw his warrant upon the State Treasurer for the amount of such judgment, and the Treasurer shall pay the same out of any funds in the State treasury not otherwise appropriated. At the next settlement thereafter made by the Controller with the County Treasurer of any county that received any portion of said illegal tax, he shall require the Treasurer thereof to pay such portion into into the State treasury to reimburse the State for the advance made on said judgment. The Board of Equalization may direct the District Attorney of any or every county interested, and the Attorney-General, to defend for such board, any proceeding commenced under the provisions of this section.

SEC. 2. The following section is added to the said Act known as the Political Code, to be known as section three thousand six hundred and sixty-five of said Code:

3665. The assessment made by the County Assessor and the State Board of Equalization, shall be the only basis of taxation for the county, or any subdivision thereof (except in incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect). All taxes upon

townships, roads, school, or other local districts, shall be collected in the same manner as county taxes.

SEC. 3. Nothing in this Act shall be construed as affecting the validity of any assessment already made, or of any proceeding taken, or to be taken, to collect any taxes levied or due, or to become due, upon any such assessment.

SEC. 4. This Act shall take effect immediately.

APPENDIX III.

Decisions of the Supreme Court of California cited but which have not yet been published in the volumes of Reports:

IN BANK.

[Filed September 18, 1880.]

WELLS, FARGO & CO, *vs.* STATE BOARD OF EQUALIZATION. } No. 7,356.

There is but a single question in this cause, and that relates to the construction of section 9 of Article XIII of the Constitution, which reads as follows:

"A State Board of Equalization, consisting of one member from each Congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year 1879, whose term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the

State for the purposes of taxation. The Controller of State shall be ex-officio a member of the board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the State board may prescribe, as to the action of the State board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll."

On the part of the State Board of Equalization it is contended that by virtue of this section they have the power to increase or lower any and every individual assessment in each and every county assessment roll within the limits of the State; and that, too, irrespective of any action on the part of the County Boards of Equalization in respect to the individual assessments upon the rolls of their respective counties.

If the State board has such power, it is unquestionably a tremendous power. It can summon to the city of Sacramento each and every taxable citizen of the State to show cause why his individual assessment upon the assessment roll of his county should not be increased. It can call there the farmer from San Diego, the miner

from Siskiyou, the mechanic from San Francisco.

That such a power might readily lead to great abuses, does not admit of doubt. Such considerations, however, afford no reason for denying the power if it does exist. They should only make us cautious in considering the question, which recurs, and is, what is the true and fair construction of the provision already quoted? Its meaning, when ascertained, we are bound to give effect to, whatever the consequences.

In the first place the section in question provides for a State Board of Equalization, and also for County Boards of Equalization. They are all to be boards of *equalization*. To equalize is to make equal, to cause to correspond, or be like in amount or degree *as compared with something*. The meaning of the term is important to be borne in mind. Now, looking at the provision of the Constitution upon the subject, we find that the duties of the State board are declared to be "to equalize the valuation of the taxable property *of* the several counties in the State for the purposes of taxation," and the duties of the county boards are declared to be "to equalize the valuation of the taxable property *in* the county for the purpose of taxation." Then follows the proviso, the ambiguity of which must be sufficiently apparent to every one: "*Provided*, such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe, as to the county assessments and under such rules of notice as the State board may prescribe as to the action of the

State board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll."

Reading the proviso as it is claimed on behalf of the State board it should be read, that board is authorized and empowered "to increase or lower the entire assessment roll or any assessment contained therein," and exactly the same power is conferred on the county boards in respect to the rolls of their respective counties.

For many reasons, it is manifest the proviso should not be so read. To do so would not only lead to the most glaring absurdities and serious conflicts between the respective boards, but would make the proviso inconsistent with the body of the section and contrary to the fundamental idea of equalization.

To illustrate: The county boards of the respective counties are in the body of the section given the power "to equalize the valuation of the taxable property in the county,"—that is to say, to compare the individual assessments upon the assessment roll, one with another, and make them equal. But how can a county board, upon the theory of *equalization*, increase or lower the *entire* assessment roll?

It is not pretended that the county boards are given any power outside of the limits of their respective counties, and it is obvious they have none. No county board can look to the assess-

ment roll of any other county than its own. It, therefore, can have nothing with which to compare the assessment roll of its own county *as a whole;* and yet the very idea of equalization of necessity presupposes something with which to compare the thing to be equalized. The construction contended for on the part of the State board would compel us to hold not only that the State board has the same power as the respective connty boards to increase or lower the entire assessment roll, but that the county boards have the like power with the State board to increase or lower the entire assessment roll of their respective counties, and that, too, without any power of *comparing* the roll with anything. If, as is contended, the State board and the respective county boards have each this power, let us see what absurd and serious consequences might follow: Suppose the county board of a particular county should lower the entire assessment roll of the county ten per cent. and the State board should *increase* the entire assessment roll of the same county ten per cent,, which would constitute the valid assessment? Or, suppose the county board of a particular county should increase an individual assessment upon the roll of the county and the State board should *lower* the same individual assessment, what then? It will not do to say that the State board has appellate jurisdiction over the action of the county boards in the exercise of powers expressly conferred by the Constitution on the county boards. The Constitution has not given any such appellate jurisdiction, and there is

no foundation for the assertion of any such power.

It is evident, therefore, that the reading of the proviso under consideration contended for by the State board might and probably would lead to very serious and absurd results. On the other hand, by reading the proviso distributively—*reddendo singula singulis*—the whole system provided for the equalization of taxes is symmetrical and harmonious, and accords with that manifest intent of local government which permeates almost every part of the Constitution. The County Boards of Equalization are familiar, or should be, with the property in their respective counties—far more so than the State board, which in the very nature of things can have but a general idea of the relative value of the property in the respective counties. It was therefore eminently wise on the part of the framers of the Constitution to limit the powers of the State board in respect to equalization, as we think they did do by the section under consideration, to the equalization of the assessment rolls of the various counties by comparing the assessment roll of each county with the roll of each and all the others, and thus make the assessment conform to the true value in money of the property contained in the respective rolls; and conferring on the local boards—the county boards—the power only to increase or lower the individual assessments upon the roll of their respective counties, and thus making them equal with each other and equivalent to the true value in money of the property assessed. Thus each board becomes what the provision treats of—a

Board of *Equalization*. Each has its own appropriate functions to perform, which can be performed without conflict and in entire harmony with the other. Applying the maxim already quoted, the provisions clearly admits of this construction, and we have no doubt that it is its true meaning and intent.

Another consideration strengthens the construction we adopt. If the State board can interfere with individual assessments upon an assessment roll, it must examine all of the other individual assessments, for in that way alone can the assessments be *equalized*. Now, the time allowed by the statute for the action of the State Board of Equalization is, and the time that can be allowed by any law that can be passed upon the subject, must of necessity be limited to a brief period; for the State board certainly can not act before the assessment rolls are made up, and must act before the taxes are paid. It is perfectly plain that any time that could be allowed between these periods would make it impossible for the State board to act upon the many thousand individual assessments within the State. And we think it clear that the framers of the Constitution never intended that they should do so.

Demurrer overruled.

Let the writ issue as prayed for.

Ross, J.

We concur:

Morrison, C. J.

McKinstry, J.,

Myrick, J.

I agree that the writ ought to issue, for the reason stated in my opinion to be filed.

THORNTON, J.

I dissent:

McKEE, J.

IN BANK.

[Filed October 26th, 1881.]

MULLIGAN, Appellant,
vs.
SMITH, Respondent. } No. 7195.

McKEE, J., delivered the opinion of the Court.

Ejectment to recover possession of certain premises described in the complaint as that portion of fifty vara lot number 3, in block number 559, of the Western Addition of the City and County of San Francisco.

"But it is urged that while the statute has not, by direct terms, conferred power upon the Mayor to decide upon the sufficiency and validity of the petition, he, of necessity, had such power, because the statute required that it should be presented to him, and, as it is not to be presumed that the Legislature intended a vain thing, it must be inferred that the officer to whom it was presented was authorized by the statute to determine whether it was in accordance with the statute or not, and that his determination of that fact was in the nature of an adjudication. But, even if that were so, the adjudication of the question would not be conclusive. A property owner would have the right to rebut it as evidence, when called upon for the first time to defend his rights to property

affected by the proceedings of which the petition was the initiative, unless the statute provided for giving him notice of the presentation of the petition, and notice was in fact served upon him. If he had no such notice, and no opportunity to be heard upon it, it is difficult to see how he can be concluded by adjudication to which he was not a party and of which he had no notice. For it is a principle which underlies all forms of government by laws, that a citizen shall not be deprived of life, liberty, or property, without due process of law. The Legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place, and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature. (*Weimer* vs. *Bonemburgh*, 30 Mich. 201.)"

"I concur. To what has been said I add: In my opinion the statute provides no notice or *process* by means of which the property owners can be subjected to the judgment of the County Court. The Act is therefore void. (*Stuart* vs. *Palmer*, 74 N. Y. 183; *Murray's Lessees* vs. *Hoboken Land and Im. Co.*, 18 How. U. S. 272; Cooley on Taxation, 266.)

"McKinstry, J."

IN BANK.

[Filed September 1, 1881.]

THE PEOPLE,
Petitioner,
vs.
SUPERVISORS SACRAMENTO COUNTY,
Respondents.
No. 7,926.

McKINSTRY, J., delivered the opinion of the Court:

This proceeding was brought to test the jurisdiction of the Boards of Supervisors of the several counties, through which run railroads operated in more than one county, to raise or lower the assessments placed upon the property of such roads by the State Board of Equalization.

In section 9, Article XIII of the Constitution, it is provided: "The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation." Except with reference to its action in respect to the property of railroads operated in more than one county, the duty of the State Board of Equalization, like that of the County board, is such as its name imports—to equalize valuations already made. The State board equalizes values as between different counties. The county board equalizes valuations as between different parcels or articles of property in the same county. (*Wells, Fargo & Co.* vs. *State Board of Equalization*, No. 7,350, opinion filed September 18, 1880.) The power of the county boards is limited to the equalization of the valuations of the local assessors.

With the exception noted, the State Board of Equalization has no original power of assessment. But it is the manifest intent of the Constitution that the valuation of the railroad property mentioned in section 10 of Article XIII shall be finally fixed and determined by the State Board of Equalization. The State board has the exclusive power to assess and equalize its value. Thus the Constitution furnishes a system for the assessment of railroads, operated in more than one county, which is separate and distinct from that provided for the assessment of other property.

The system is prescribed in section 10 of Article XIII: "The franchises, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

It can not be doubted (if the Constitution is constitutional) that the State board of Equalization has power thus to assess the railroad property mentioned in section 10 of Article XIII, and to apportion the same to the several counties, etc. The portion of the section quoted is clearly self-executing. We are at a loss to imagine how any statute could make the duty of the State board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built upon the words cited, it would be dispelled by the first clause of the same section: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or

district in which it is situated, in the manner prescribed by law. Thus, by the very language of the Constitution, all other but the railroad property mentioned must be assessed by the local assessors, in the manner prescribed by statute. The railroad property must be assessed in the manner prescribed by the section of the Constitution.

If legislation is necessary (and it be true that none has been had) to furnish machinery for transmitting to the several counties official notice of the apportionment made by the State Board of Equalization, or if the statute in that regard has not been complied with by the State board, or if the tax can not be legally collected for want of any appropriate legislation, no one of such defects or errors authorizes the Board of Supervisors to add to or deduct from the valuation of the State board. Nay, even if it should be admitted (and we do not admit it) that the provision of the State Constitution which attempts to confer upon the State Board of Equalization the exclusive power of assessing certain property, and of apportioning the tax thereon, is invalid, because in conflict with some provision of the Constitution of the United States, this invalidity would not increase the jurisdiction of the Supervisors as a Board of Equalization. In such case the attempted valuation by the State board would be void. Could the Board of Supervisors make a valid assessment by reducing the amount of the invalid assessment made by the State Board of Equalization?

The order of respondents purporting to reduce assessments, as set forth in the petition herein, is annulled.

We concur: Myrick, J., Sharpstein, J., Ross, J., Thornton, J., McKee, J., Morrison, C. J.

—[Pac. Coast L. J., Vol. VIII, p. 103.

SUPREME COURT U.S.
JAN 3 1882
JAMES H.

SUPREME COURT OF THE UNITED STATES.

No. 1127.

COLLIS P. HUNTINGTON, APPELLANT,

vs.

CHARLES E. PALMER, TAX COLLECTOR OF THE COUNTY OF ALAMEDA, AND THE CENTRAL PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEE.

ALFRED BARSTOW, Counsel for Appellee.

IN THE

SUPREME COURT

OF

THE UNITED STATES.

HUNTINGTON,

Appellant,

VS.

PALMER,

Appellee.

BRIEF FOR APPELLEE.

This is a suit in equity, brought by the complainant as one of the stockholders of the Central Pacific Railroad Company, to enjoin the railroad company from paying, and the Tax Collector from collecting, the taxes assessed upon the property of the railroad company in the County of Alameda, State of California. The suit is brought in his own behalf, as the holder of one thousand shares of the capital stock of the railroad company, and in behalf of all other stockholders who may come in and contribute to the prosecution of the suit.

The tenth Section of Article XIII of the Constitution of California, adopted in 1879, is as follows:

"SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner provided by law. The franchise, roadway, roadbed, rails, and rolling-stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of

Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

In 1880, an amendment to the Political Code of the State was adopted (See appellant's brief, p. 60), by which the provision of the above section of the Constitution, relating to the assessment of railroads, was incorporated into the code, and provision was also made requiring the officers of the several railroad companies to furnish certain statements or lists of property.

By virtue of that provision of the Constitution the property, including the franchise of the railroad company in this case ,was assessed by the State Board of Equalization for the year 1880, and the assessment was apportioned among the several counties, the entire assessed value being $12,239,456.

The tax for State and county purposes, upon the amount of the assessed value apportioned by the State Board of Equalization to the County of Alameda, for the year 1880, amounts to the sum of $22,864 24. Neither the amount of the capital stock of the railroad company nor the number of shares into which it is divided, is stated in the bill.

The Tax collector filed a general demurrer to the bill. The demurrer was sustained, and judgment was rendered dismissing the suit.

I.

The Defects in the Bill, as a Bill, for an Injunction, are very Apparent.

Many of these defects will hereafter be noticed in detail.

It contains no allegation of irreparable injury.

Nor any allegation that it will prevent a multiplicity of suits.

Nor does it show that a sale for this tax will cast a cloud on the title to real estate.

Nor is there any offer to pay any sum whatever as taxes—in other words, the complaint does not offer to do equity.

II.

The amount in Controversy is so trifling, that a Court of Equity will not Interpose for its Protection.

Neither the amount of the capital stock of the corporation, nor the number of shares into which it is divided, nor the par value thereof is stated in the bill. It is stated in the amendment to the bill that there are valid liens upon the property of the corporation to the amount of $54,000,000, and it would not be unfair to assume that the capital stock was at least $60,000,000, divided in the usual manner into shares of the par value of $100 each. The shares owned by the complainant, would, on that assumption, amount to one six hundredth part of the whole number. Should the tax in question—$22,864 24—be paid by the corporation, the complainant would be affected only in the amount of $38 10. The maxim, *de minimis non curat lex*, has a just application here.

The application of the maxim cannot be avoided, by saying that the action is instituted also in behalf of all the stockholders who may elect to come in and unite in the prosecution of the action. This position is considered in the next point.

III.

This Court has no Jurisdiction of this Action, and the Appeal must be Dismissed.

The Revised Statutes, Section 692, as amended by the Act of February 16, 1875, provide that "an appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court, * * * in cases of equity, * * * when the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000." * * * The sum in dispute here is $38 10, or possibly twice that sum, but not exceeding $100. It is incumbent on the complainant to make it appear that the sum is suffi-

cient to bring the case within the jurisdiction of this Court.

The fact that the complainant sues in behalf of the other stockholders, who may come in and prosecute the action, will not relieve the case of the jurisdictional impediment. It does not appear that any of the other stockholders are aliens, or citizens of other States than California. Such stockholders are not to be considered in the determination of this question; and their interest in the question of the liability of the property of the corporation for the payment of the tax above mentioned, is not to be taken into the account in ascertaining the amount in controversy, unless such stockholders could have united with the complainant in instituting the suit. This Court has no jurisdiction on appeal, unless the Circuit Court had original jurisdiction of the action. The Circuit Court had no jurisdiction of a cause of action, on the ground of citizenship of the parties, unless it was there shown that the persons to whom it accrued were aliens, or citizens of other States than California.

Coal Company v. Blatchford, 11 Wall. 172.
Ober v. Gallagher, 93 U. S. 204.
Godfrey v. Terry, 97 U. S. 172.

In the last cited case the Court say that Terry alone is alleged to be a citizen of another State. "What is the citizenship of five or six other parties who, by the decree are called complainants and bill holders, and who are awarded execution for their debts against sixty-four defendants, we are not informed."

The section of the statute defining the jurisdiction of the Circuit Courts is quite similar, in the respects in question, to the first clause of section two of the Act of March 3d, 1875, providing for the removal of causes from the State to the Circuit Court; and the construction given to that clause throws light upon the point now presented. In

The Removal Cases, 100 U. S. Rep. 457,

In construing the second Section of the Act of March

3d, 1875, it was held that in order to a removal of a cause, it was necessary that all the persons constituting the party on one side of the controversy must be citizens of different States from those on the other side. That case was afterwards affirmed in—

Ayers v. Chicago, 101 U. S. 184.
Pacific R. R. v. Ketchum, Id. 298.
Burney v. Latham, 103 U. S. 211.
Blake v. McKim, Id. 337.
Burke v. Flood, 6 Sawyer, 220.

Upon the same grounds upon which those decisions proceeded, it must be held that the other stockholders could not have been united with the complainant in this action, without the averment that they were aliens or citizens of other States than California; that in the absence of that averment, the Circuit Court would have had no jurisdiction of an alleged cause of action accruing to them; and that as there is no averment of that fact in this case, those stockholders are to be left out of the account in determining the question of the jurisdiction of this Court. The appeal should therefore be dismissed.

IV.

Courts of Equity will not interfere with the collection of taxes, except for the most cogent reasons.

High on Injunctions, Sec. 485.
Cooley on Taxation, p. 536.
Felton v. National Bank, 101 U. S. 144.
Kirtland v. Hotchkiss, 100 U. S. 498.

V.

The decision of the State Court, as to the construction and effect of the Constitution or statute, is binding on the Federal Courts.

People v. Weaver, 100 U. S. 541.
State Railroad Tax Cases, 92 U. S. 575–606.
Stone v. Wisconsin, 94 U. S. 181.
Hall v. McCuir, 45 U. S. 500.
A. & P. R. R. v. Hopkins, 94 U. S. 13.
Lannahan v. Sears, 102 U. S. 318.

VI.

The Power of Assessment—the Valuation of Property—for the purposes of taxation, is Purely Judicial.

Weaver v. Devendorf, 3 Denio, 117.
Buffalo & S. R. R. v. Supervisors of Erie, 48 N. Y. 99.
People v. Trustees of O., Id. 394.
Western R. R. v. Nolan, Id. 513.

The Courts, therefore, are not justified in exercising functions which are specially committed to designated officers. The valuation of property by an Assessor may, upon a proper application to the several Boards of Equalization, be reviewed and changed.

Political Code, Secs. 3673–3692.
Constitution of California, Art. XIII, Sec. 9.

Such valuation, being the result of a judicial act, can be reviewed in no other way.

Cooley on Taxation, 288.
Republic Life Ins. Co. v. Pollack, 75 Ill. 292.
Porter v. Railroad Co., 76 Ill. 561.

ALLEGED ANTI-RAILROAD DISCRIMINATION.

It is idle to say that the Constitution makes any unjust discrimination against railroads. The State may, by its Constitution, provide how all property within the State shall be assessed for the purposes of taxation. It may be provided that land and its improvements shall be separately assessed, or be assesed as one parcel of property. It may be provided that all the various estates and interests in land shall be assessed as one parcel, and to the owner in fee, or to the person in possession, or that the several estates, interests in, or liens upon land shall be assessed to the several owners thereof, and there will be no just ground of complaint. Such provisions may extend to all classes of realty and of personalty, or to only one of them, or to certain classes of either of them. There is no better ground for railroad companies to complain that they

are not assessed in the same manner as lands, than there is for the owners of personal property to make the same complaint.

The fourth section of Article XIII of the Constitution, provides that in case of all kinds of property except that of *quasi-public* corporations, the interest in the property shall be divided into two parts; that of the value of the security, and the residue of the value of the property after deducting the value of the security; and that the several parts shall be assessed to the owners thereof; no property is thereby exempted from taxation, In such case, as well as in the case of the property of a *quasi-public* corporation, the entire property is taxed only once. The Constitution simply classifies property for the purpose of its assessment. There is no better ground for a railroad company to complain of this classification than there would be for the owner of land in fee, which was subject to a lease, to complain that the Constitution had not divided it, for the purpose of assessment, into two estates or interests, as it did in the case of land subject to a mortgage. Whether the constitutional classification be judicious or not, it is manifest that the Constitution does not provide for duplicate taxation in case of *quasi-public* corporations, nor that it shall be assessed at higher rates than other property, nor does it exempt the property of others from equal taxation.

VII.

The power of the State as to the mode, form, and extent of Taxation is unlimited, unless restrained by the Federal Constitution.

State Tax on Foreign-held Bonds, 15 Wall. 300.
Kirtland v. Hotchkiss, 100 U. S. 497.
Savings & Loan Society v. Austin, 46 Cal. 501.

And, accordingly, an assessment is valid when made without notice to the taxpayer, if the statute does not provide for notice.

State Railroad Tax Cases, 92 U. S. 601.
McMillen v. Anderson 95 U. S. 42.
The Delaware Railroad Tax, 18 Wall. 231.

VIII.

Corporations being entities, created by the State, are subject to taxation in the manner and to the extent that the State may prescribe; and they cannot complain if the assessments are made in a different manner, and on a different basis, from that upon which the property of individuals is assessed.

Cooley on Taxation, p. 273, and note.

IX.

Injunction is not the Remedy, in case of Alleged Illegal Taxation, or Excessive Valuation, etc.

Savings and Loan Society v. Austin, 46 Cal. 488–9.
Houghton v. Austin, 47 Cal. 651.
Bucknall v. Story, 36 Cal. 67.
C. P. R. R. v. Corcoran, 48 Cal. 65.
Smith v. Commissioners of Leavenworth, 9 Kansas. 300.
State R. R. Tax Cases, 92 U. S. 606.
Lincoln v. City of Worcester, 8 Cush. 55.
Howe v. City of Boston, 7 Cush. 274.
Green v. Mumford, 5 R. I. 427.

In the case last cited it is said that a cloud cast upon title of a taxpayer is of too little consequence, in comparison with the inconvenience and evils arising from interference with the operation of the revenue system, to justify a Court of equity to enjoin a sale.

Brewer v. City of Springfield, 97 Mass. 152.

It is there said that plaintiff suffers no wrong until he pays the tax, and that, if it be illegal, he can then recover it back. Therefore injunction is not the proper remedy.

Chicago & B. R. R. v. Fray, 22 Ill. 34.
Merritt v. Farris, 22 Ill. 303.
Munson v. Minor, 22 Ill. 606.
Jones v. Sumner, 27 Ind. 510.

The National Courts will not grant an injunction, in case of an alleged illegal assessment or taxation of property for State purposes, where the Courts of the State would refuse that remedy; the alleged illegality involving only the construction of the Constitution and statutes of the State.

X.

An action for the recovery of the money paid under protest is an adequate remedy at law.

Meek v. McClure, 49 Cal. 628.
Bank of Mendocino v. Chalfant, 51 Cal. 369.
Smith v. Farelly, 52 Cal. 80.
Bank of Santa Rosa v. Chalfant, 52 Cal. 170.
De Fremery v. Austin, 53 Cal. 380.
Brewer v. City of Springfield, 97 Mass. 152.

Injunction will not lie to restrain the collection of a tax, unless the collection of the tax would result in irreparable injury; nor will it lie, in any case, where the law gives the taxpayer a plain, speedy, and adequate remedy, by a resort to which, the damage may be prevented.

Dows v. Chicago, 11 Wall. 108.
Williams v. Corcoran, 46 Cal. 553.

In no sense could it be said, that irreparable injury could follow any attempted collection of a tax, imposed under an Act of the Legislature, which is alleged to be void.

Cooley on Taxation, 536-542.

XI.

Equity will not relieve by injunction unless the taxpayer pays the tax justly chargeable to him.

State Railroad Tax Cases, 92 U. S. 606.

It is not sufficient to allege that he is ready and willing to pay. He must pay what is due.

Gulf Railroad Co. v. Morris, 7 Kans. 229.

Plaintiffs had not paid or offered to pay the amount justly chargeable, and the Court ask: Is this equitable or just? And the answer is: No.

National Bank v. Kimball, 103 U. S. 732.

It is the established rule of this Court, that no one can be permitted to go into a Court of equity to enjoin the collection of a tax, unless he has shown himself entitled to the aid of the Court, by paying so much of the tax assessed against him as can be plainly seen he ought to pay.

In the following cases the parties charged with the tax had paid the several amounts due for taxes, and, in the opinion, the Court states that fact, and sustains an injunction as to balance only.

Pelton v. National Bank, 101 U. S. 148.
Cummings v. National Bank, Id. 163.

A valid assessment having been made by the State Board, as will hereafter be shown, the portion of the tax which was levied for county purposes is valid beyond all question—no doubt being expressed as to the sufficiency of the statute under which the county tax was levied. No reason can be urged for the failure to pay this portion of the tax.

XII.

If it be true, as alleged in the Bill, that the whole Tax is illegal, because the Statute providing for the Levy of the Tax, or the Statute defining the Powers and Duties of the Board is Unconstitutional, then Injunction will not lie.

Bucknall v. Story, 36 Cal. 67.
Cooley on Taxation, 536–542.

A sale for such illegal tax can be productive of no injury.

XIII.

The Facts Stated do not show that a sale will cast a cloud on the title of the railroad or the plaintiff.

The purchaser must make out his title under the tax proceedings, and its prima facie validity must depend

upon the validity of the laws under which the tax was levied and the lands sold. Those laws become parts of the tax deed, and if they are invalid, the tax title must necessarily fail. It does not possess, in itself, sufficient substance to cast a cloud.

No authorities are needed in support of this proposition. We cite only:

Hannewinkle v. Georgetown, 15 Wall. 548, and cases cited.
High on Injunction, Secs. 492–526.

XIV.

The Courts have no Jurisdiction to inquire into the Valuation of Property for the Purposes of Taxation.

This jurisdiction has been committed to the Assessors and the Boards of Equalization.

The utmost that the Courts could do would be to review the determination of those officers; and that, from the nature of the proceedings, would be futile, for the Courts could not have before them the examination, the views, the opinions of those officers.

Should the Courts, notwithstanding those apparently insurmountable obstacles, enter upon the review, the Courts themselves could not make the new valuation, but must order it to be made. That valuation would be useless for all practical purposes, for the times for the levy of the tax, its collection, the sale of the property, etc., have passed.

The manner provided by law for the ascertainment of the value of property, and the designation of the officers who shall perform that duty, according to the provisions of Section 1, Article XIII (Revenue and Taxation), are as imperative and exclusive as was the provision of the late Constitution, that such duty must be performed by Assessors elected, etc.

If the Courts can make, or order to be made, a new valuation at the instance of the complainant, why cannot the State also invoke the aid of the Courts for the

same purpose, upon the allegation that the several valuations, or some of them, are too low?

Or why could not an individual, or any number of them, invoke the aid of the Courts of equity to relieve him from excessive taxation, caused by the fact that the property of these plaintiffs, and of other persons, was assessed at too small a sum?

If the Courts may, from time to time, alter, or cause to be altered, the valuation, the basis on which the tax levy is made under the statute could never be found—it would always be an uncertain quantity.

Cases to the effect that Courts cannot make valuations for the purposes of taxation, and that parties alleging that the valuation is excessive, have only the remedies which the revenue laws provide, are numerous. See, among others:

State R. R. Tax Cases, 92 U. S. 616.
Chatham v. U. S. 92 U. S. 89.

In the case last cited the Court says: "If there existed in the Courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardships of taxation, the very existence of the government might be placed in the power of a hostile judiciary." In

Delaware Tax Cases, 18 Wall. 231,

The Court says: "Our only concern is with the *validity* of the tax; all else lies beyond the domain of our jurisdiction."

Dow v. City of Chicago, 11 Wall. 108.
McMullen v. Anderson, 95 U. S. 42.
Albany and S. R. R. Co. v. Canaan, 16 Barb. 249.
Stewart v. Maple, 70 Pa. St. 223.

It is said in the last case (complaint being of an increase of valuation) that the remedy for illegal taxation is by an appeal taken to those to whom the appeal is required to be taken. *If none be given* the Court cannot exercise the judgment of the tax officers.

Clinton S. Dist. Appeal, 56 Pa. St. 319.
Kimball v. Schuylkill, 5 Pa. St. 366.
Everett's Appeal, 71 Pa. St. 218.
Hughes v. Kline, 30 Pa. St. 230.
Bowen v. City of Boston, 2 Gray, 495.
Lincoln v. City of Worcester, 8 Cush. 55.
Republic Ins. Co. v. Pollack, 75 Ill. 292.
Ottaway Glass Co. v. McCaleb, 81 Ill. 556.
Cooley on Taxation, pp. 157, 128, 540.

The Courts, we repeat, cannot make a valuation, nor order a new one to be made; nor have they jurisdiction to review the evidence upon which it was made; nor are there any means provided by the law by which there can be brought before them matters of personal observation, knowledge, view, etc., upon which the valuation largely depends; nor can the Court say, as a legal proposition, that a valuation is fatally defective, because the officers took into the account the business carried on by the corporation, for the purpose of determining the value of the property.

XV.

Section 10, of Article XIII, of the Constitution of California, is self-executing, and by virtue of its provisions the State Board of Equalization is required to assess the property of the railroad corporation.

That section is cited in full in the first portion of this brief. There is no provision or clause of the Constitution which is in conflict with the provisions of that section.

The complainant contends that certain amendments to the Political Code, adopted March 22, 1880—(See appellant's brief, p. 60)—are repugnant to the Constitution and void. Those sections, as amended by that Act, merely provide for the statement, showing in detail the property of the corporation, and also for the apportionment to the several counties, of the valuation of the property of the railroad corporations, as assessed by the State Board of Equalization; but those sections of the Code neither add to, vary, nor limit the

power of the State Board of Equalization, as defined by the Constitution. The power thus conferred is plenary, and needs no assistance from legislation.

It was held by the Supreme Court of this State, in

People v. Supervisors of Sacramento County,

Decided September 1, 1881 (See copy of opinion hereto appended), that section ten, Article XIII, of the Constitution is self-executing; that by virtue thereof the Board possesses the power to make the assessment and apportion the same among the several counties. And the Court adds, "We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution."

However defective the Act of 1880 may be, its defects cannot impair the constitutional power of the State Board to make the assessment and the apportionment thereof among the several counties. This construction of the Constitution will, of course, be obligatory upon this Court. There is therefore a valid assessment of the property of the corporation, and a valid apportionment thereof among the several counties.

If the rate of taxation for that year has been properly fixed, there is no possible room to doubt that the corporation and its property is liable for the amount so assessed and apportioned to this county—the County of Alameda.

XVI.

The Act of April 16, 1880, mentioned in the bill, amendatory of Section 3713, of the Political Code, providing for the ascertainment of the rate of taxation by the State Board, is not unconstitutional.

The Legislature, by the appropriation bills, appropriated certain sums of money, for the two succeeding fiscal years; the revenue law provides that the total assessments of the several counties shall be returned to the State Board (Political Code, Sections 3,692, 3,728–9); and the section in question merely provides that the State Board shall by computation fix such an ad valorem rate of taxation upon the assessed value of the

property so returned to the State Board, as will raise the several sums specified in the appropriation bills, and aggregated in the above mentioned section; and also the amount allowed by law for delinquency.

It was considered by the Supreme Court of the State, in

Savings and Loan Society v. Austin, 46 Cal. 415,

That the provision of the Code then in force, which required the State Board to fix the rate which should be allowed for delinquency was unconstitutional; but by the subsequent statute of 1877–8, Section 3,696 of the Political Code was amended, and it was thereby provided that (12) twelve per cent. should be allowed for delinquency. That amendment removed the entire ground of the objection to the provisions of the Code, requiring the State Board to fix the ad valorem rate of taxation. Nothing was left to the discretion of the State Board in that respect, but in discharing its duties, it merely made an arithmetical computation. It did not, in any sense pass a law. That duty might have been imposed upon the Controller, and there would be no room to doubt its validity. The amendment brings the matter entirely within the doctrine of

Savings and Loan Society v. Austin, 46 Cal. 415.
Houghton v. Austin, 47 Cal. 646.
People v. Salmon, 51 Ill. 54.

XVII.

The Title of the Act of March 22, 1880, (cited in Appellants brief) is sufficient to meet the Requirements of the Constitution.

If, for any reason, it be considered that the tenth section of Article XIII is not sufficient to enable the State Board to assess the property of the corporation, and that it requires the aid of the above mentioned Act, in order to make that section effectual, we say that the title of the above mentioned Act is sufficient to answer the requirements of the Constitution. The

Constitution contains the following provision (Section 24, Art. IV.):

"Every Act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an Act which shall not be expressed in its title, such Act shall be void only as to so much thereof as shall not be expressed in its title."

The title of the Act is stated in the bill of complaint. It amends certain sections of the Political Code "relating to revenue," and adds two new sections to the Code, by their numbers, and those numbers cannot find any other place or position in the Code than that relating to revenue. The title sufficiently conforms to the constitutional requirement.

Cooley, Constitutional Limitations, pp. 177–8.
People v. Brady (in relation to the City of Rochester), 50 N. Y. 560.
Morford v. Unger (to amend the Act to incorporate the City of Muscatine. One section added territory to the city), 8 Iowa, 82.
Burke v. Monroe County (Act to restore uniformity in the taxation of property. Contained a section repealing laws requiring cities to support their paupers), 77 Ill. 611.
Maunch Chunk v. McGee, 81 Pa. St. 433.
Robinson v. Shipworth, 23 Ind. 311.
Clinton v. Draper, 14 Ind. 295.
Sun M. Ins. Co. v. Mayor, 8 N. Y. 252.

The Court in the last case say that the purpose of the constitutional provision was that neither the members of the Legislature nor the people should be misled by the title, and that the question whether it might not be made more specific, is addressed to the Legislature.

The purpose was, as was said by Mr. Justice Sharswood, in

Yeager v. Weaver, 64 Pa. St. 127,

"To prohibit the vicious practice of rolling together what were termed 'omnibus bills,' including sometimes

more than a hundred sections, with the addition to the title, 'and for other purposes.'" It is further said in

Alleghany Home Case, 77 Pa. St. 77,

All that is required is that the title give notice of the subject of the Act, so as reasonably to lead to inquiry into its body. It need not be an index to its contents; on the other hand, it should not mislead.

People v. Mahoney, 13 Mich. 494.
In *University v. Bernard*, No. 7566, Supreme Court of Cal., decided January 23, 1881.

The Court held that the title, "An Act to add five new sections to the Political Code, providing for funding and refunding county indebtedness," was in compliance with Section 24, Article IV, of the Constitution.

Had the title been the same as that of the revenue law of 1861, page 416—"An Act to provide revenue for the support of the government of this State;" and had the Act contained all that that Act does, from the levy of the State tax through the whole course of procedure to the delivery of the tax deed, it would not be questioned that the title was sufficient. The amendment of certain sections, the repeal of specified sections, and the addition of certain sections to the portion of the Political Code, relating to revenue, is more specific than the title above suggested. It was sufficient to direct a reasonably intelligent legislative mind to the general purposes of the Act.

XVIII.

Neither the Constitution nor the Statute requires a separate Valuation of the Franchise, the Right of Way, the Roadbed, the Rails, and the Rolling Stock, etc.

The provision of Section 10, Article XIII, is that "the franchise, roadway, roadbed, rails, and rolling stock of all railroads * * * shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned," etc.

It would be impracticable to value separately the roadbed as a separate parcel of property from the road-

way, or the rails as separated from the ties, or the roadbed, or the roadway, and the above provision does not require it to be done. It is difficult to conceive of the franchise dissevered from the road, as having any value, or of rolling stock separated from the road, and apportioned by the mile.

The Political Code, Section 3664, as amended in 1880, p. 44, provides that "the assessment shall be made upon the entire railway within the State, and shall *include* the right of way, roadbed, track, bridges, culverts, and rolling stock." There is no better ground for saying that all those things are required by the Code to be separately valued, than for saying that each bridge and culvert shall be separately valued. There is very good reason for saying that one of the principal purposes in requiring the valuation to be made by the Board, was to have the whole railroad valued as one piece of property; for, if the intention was that each parcel into which the property could be subdivided should be separately valued, there is no reason why that should not have been done by the County Assessors.

It was intended that such property should be assessed as provided by Section 10. The provisions of Section 2, and other sections of Article XIII, in relation to a separate assessment of lands and the improvements, have no relation to this kind of property. That section refers to the assessment of property by local Assessors. The Constitution separates the kinds of property herein involved, from all other kinds of property, both as to the manner of assessment and as to the officers by which that assessment is to be made. As well might it be claimed that Section 3, requiring assessments of land to be made in a certain manner, applied to this kind of property.

Gulf R. R. Co., v. Morris, 7 Kansas, 222.
State R. R. Taxes, 92 U. S. 606–12.

XIX.

Actual Value, Cash Value, and Actual Cash Value, mean the same thing.

Cummings v. National Bank, 101 U. S. 153, citing Burroughs on Taxation, Sec. 99.

XX.

No attempted Breach of Trust being alleged against the Defendant Corporation, and the Act complained of—the Payment of Taxes—being within the scope of Charter authority, a Court of Equity will not enjoin at the Suit of a Stockholder.

Angell & Ames on Corporations, 312.
18 How. U. S. 331.

Respectfully submitted.

ALFRED BARSTOW,
Counsel for the Tax Collector.

APPENDIX.

IN THE SUPREME COURT OF CALIFORNIA.

IN BANK.

[Filed September 1, 1881.]

PEOPLE
vs.
SUPERVISORS OF SACRAMENTO COUNTY. } No. 7,926.

This proceeding was brought to test the jurisdiction of the Boards of Supervisors of the several counties, through which run railroads operated in more than one county, to raise or lower the assessments placed upon the property of such roads by the State Board of Equalization.

In Section 9, Article XIII, of the Constitution, it is provided: "The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation." Except with reference to its action in respect to the property of railroads operated in more than one county, the duty of the State Board of Equalization, like that of the County Board, is such as its name imports—to equalize valuations already made. The State Board equalizes values as between different counties. The County Board equalizes valuations, as between different parcels or articles of property in the same county. (*Wells, Fargo & Co. v. State Board of Equalization*, No. 7,350, opinion filed September 18, 1880.) The power of the County Boards is limited to the equalization of the valuations of the local Assessors.

With the exception noted, the State Board of Equalization has no original power of assessment. But it is

the manifest intent of the Constitution that the valuation of the railroad property, mentioned in Section 10, of Article XIII, shall be finally fixed and determined by the State Board of Equalization—the State Board has the exclusive power to assess and equalize its value. Thus the Constitution furnishes a system for the assessment of railroads, operated in more than one county, which is separate and distinct from that provided for the assessment of other property.

The system is prescribed in Section 10, of Article XIII: "The franchises, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

It cannot be doubted (if the Constitution is constitutional) that the State Board of Equalization has power thus to assess the railroad property mentioned in Section 10 of Article XIII, and to apportion the same to the several counties, etc. The portion of the section quoted is clearly self-executing. We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built upon the words cited it would be dispelled by the first clause of the same section: "All property *except as hereinafter in this section provided*, shall be assessed *in* the county, city, city and county, town, township, or district in which it is situated, *in the manner prescribed by law*." Thus, by the very language of the Constitution, all other but the railroad property mentioned must be assessed by the local Assessors, in the manner prescribed by statute; the railroad property must be assessed in the manner prescribed by the section of the Constitution.

If legislation is necessary (and it be true that none has been had) to furnish machinery for transmitting to

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 171.

JOHN J. VINTON ET AL., APPELLANTS,

vs.

HOMER HAMILTON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO.

FILED MARCH 31, 1879.

SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 Pleas in the circuit court of the United States for the northern district of Ohio, held at the United States court-rooms in the city of Cleveland, in the district aforesaid, before the judges thereof, on Thursday, the 12th day of September, in the April term of said court, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

A. J. RICKS, *Clerk.*

2 *Bill.*

In the United States circuit court, northern district of Ohio.

JOHN J. VINTON, JOHN FISHER, WILLIAM McGILVRAY, and THOMAS E. BLUNT
vs.
HOMER HAMILTON, FREDERICK GERRWIG, John Stambaugh, and William Todd, doing business as Homer Hamilton & Co.
} In equity.

To honorable Martin Welker, judge of circuit court of the United States, northern district of Ohio:

John J. Vinton, John Fisher, William McGilvray, and Thomas E. Blunt, of Sharon, in the county of Mercer and State of Pennsylvania, bring this their bill of complaint against Homer Hamilton, Frederick Gerrwig, John Stambaugh, and William Todd, doing business as Homer Hamilton and Company, at Youngstown, in the county of Mahoning, in the State of Ohio.

3 And thereupon your orators complain and say that the said John J. Vinton was the original and first inventor of a new and useful improvement in the manufacture of iron from furnace slag, not known or used before his said invention, and which was not at the time of his application for a patent therefor, as hereinafter mentioned, in public use with his consent or allowance.

And your orators further show that upon due application therefor, and in accordance with the law, said Vinton did obtain letters patent of the United States for said invention in due form of law, said letters patent being numbered 143600 and bearing date the 14th day of October, 1873, granting unto the said John J. Vinton, his heirs or assigns, for the term of 17 years from said 14th day of October, 1873, the exclusive right to make, use, and vend the said invention throughout the United States and Territories thereof; all of which, in and by a certified copy of said letters patent in court to be produced and shown your honor, will more fully and at large appear.

And your orators further show that a certain assignment was made by the said John J. Vinton, and duly recorded in the Patent Office of the United States on the 28th day of April, 1874, in liber W 17, page 192, of transfers of patents, whereby your orators John Fisher, William McGilvray, and Thomas E. Blunt became the legal owners of three-fourths of the entire interest in said patent granted to said Vinton as

4 aforesaid, as by reference to the same, or to certified copy thereof, in court to be produced and shown your honor, will more fully and at large appear.

And your orators further show that the invention so secured to them by letters patent and assignment thereof is of great value to them, and

would be of much greater value and profit if it were not for the wrongful acts of the defendants and their confederates, as hereinafter set forth.

Yet the defendants, well knowing the premises and the rights secured to your orators as aforesaid, but contriving how to injure your orators and to deprive them of the profits, benefits, and advantages which might and otherwise would accrue from the invention so secured to them by the said patent numbered 143600, did, at Youngstown, Mahoning County, Ohio, as your orators are informed and believe, without license or consent from your orators, and in violation of your orators' rights, and in infringement of their said letters patent, unlawfully and wrongfully make a large quantity of iron from blast-furnace slag (how much your orators cannot state, but pray that the defendants may discover and set forth) in the same or substantially the same way, or by the same method, substantially as described in the schedule accompanying and forming part of said letters patent, and that they still make and intend to make iron from blast-furnace slag, without
5 your orators consent or allowance and without right, and in violation of said letters patent and your orators' exclusive rights as aforesaid; and thereby said defendants have infringed, and are still infringing, and preparing to infringe, and cause your orators to fear that in future they will infringe, upon the exclusive rights and privileges secured to your orators by said letters patent and the assignment thereof as aforesaid.

And your orators show that they have been greatly demaged and injured by the wrongful acts of the defendants, and fear, and have reason to fear, being further injured in the future by the continuance of such acts.

And your orators further show that the said defendants have been requested to desist from infringing said letters patent, and have been notified of the exclusive right thereby granted, that they were infringing the same, and that they have been offered a license on favorable terms to manufacture iron under said patent.

But now so it is, may it please your honor, that said defendants have combined and confederated with other persons, to your orators unknown, but when discovered your orators pray leave to make defendants hereto, to resist and destroy the exclusive rights and privileges secured to them by said patent and assignment as aforesaid, with-
6 out license of your orators, and in violation of their just rights in the premises, all of which is contrary to equity and good conscience.

And forasmuch as your orators can have no adequate relief except in this court, and to the end that the defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their oath and according to their best and uttermost knowledge, information, and belief, full and true and perfect answer make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if interrogated as to each and every of said matters, and may be compelled to account for and pay to your orators the profits by the defendants acquired, and the damages suffered by your orators from their aforesaid unlawful acts.

And your orators further pray that the said defendants, their servants and workmen, and each and every of them, may be restrained and enjoined by the order of this honorable court from making, using, or vending iron made in accordance with the invention set forth in said letters patent, or substantially in the same way.

And that the defendants may be decreed to pay the costs of this suit.

And that your orators may have such other and further relief
7 as to this honorable court shall seem meet and shall be agreeable to equity.

May it please your honor to grant into your orators the writ of subphœna issued out of and under the seal of this honorable court, directed to the defendants, commanding them, by a certain day and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and to stand and abide such order and decree as may be made against them, or either of them.

And your orators will ever pray, &c.

A. McCALLUM,
Solicitors for Complainants.

8 STATE OF OHIO,
Mahoning County, ss:

I, William McGilvray, one of the above-named petitioners, do solemnly swear that I have read the foregoing bill of complaint and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information I believe to be true.

WILLIAM McGILVRAY.

Sworn to and subscribed before me this the 9th day of July, A. D. 1874.

S. L. CLARK,
Notary Public.

Filed July 17th, 1874.

9 THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, greeting:

You are hereby commanded to summon Homer Hamilton, Frederick Gerrivig, John Stambaugh, and William Todd, if they be found in your district, to be and appear in the circuit court of the United States for the northern district of Ohio aforesaid, at Cleveland, on the first Monday in September next, to answer a certain bill in chancery filed and exhibited in said court against John J. Vinton, John Fisher, William McGillray, and Thomas E. Blunt.

Hereof they are not to fail, under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the honorable M. R. Waite, Chief Justice of the United States, this 17th day of July, A. D. 1874, and in the 99th year of the Independence of the United States of America.

[SEAL.] EARL BILL, *Clerk*,
By CHARLES H. BILL,
Deputy Clerk.

10 MEMORANDUM.—The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of September, 1874; otherwise the said bill may be taken pro confesso.

EARL BILL, *Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

On the 31st day of July, A. D. 1874, I made due service of this writ on the within-named Homer Hamilton, at Youngstown, Mohoening County, Ohio, by delivering to him a true and certified copy thereof; also, same day and place, I made due service of this writ on the within-named Frederick Gerrivig, by leaving at his usual place of abode, in the hands of his daughter Lucy, he being absent from home, a true and duly certified copy thereof; also, on same day, left a true and duly certified copy of this writ at the usual place of abode of the within-named John Stambaugh, in the hands of his wife Catherine, he being absent from home, a true and duly certified copy of this writ, at Youngstown, Mahoening County, Ohio; also, on same day, I left, at the usual place of abode of the within-named William Todd, in the hands of his sister-in-law Mrs. W. C. Bunts, he being absent from home, a
11 true and duly certified copy of this writ, at Youngstown, Mahoening County, Ohio.

N. B. PRENTICE,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

I acknowledge myself security for all costs for which the plaintiff may be liable in this suit.

CHARLES A. OTIS.

(Endorsed:) John J. Vinton et al. vs. H. Hamilton et al. Subpœna in chancery. Returnable first Monday of September, 1874. Rule of appearance first Monday of September, 1874. Rule of answer first Monday of October, 1874. Returned and filed Aug. 5th, 1874. Chas. H. Bill, deputy clerk. A. McCallum, complainants' solicitor.

12 From order-book, page 114, August 24th, 1874.

JOHN J. VINTON ET AL. }
vs.
H. HAMILTON ET AL. }

The appearance of the defendants in the above suit is hereby entered
THOS. W. SANDERSON,
Sol. for Respondent.

Answer of defendants.

In the United States circuit court, northern district of Ohio.

JOHN J. VINTON, JOHN FISHER, WILLIAM McGilarry, and Thomas E. Blunt
vs.
HOMER HAMILTON, FREDERICK GERIVIG, John Stambaugh, and William Todd (Homer Hamilton & Co.). } In equity. Answer.

The joint and several answer of Homer Hamilton, Frederick Gerivig, John Stambaugh, and William Todd, who are copartners by said firm-name of Homer Hamilton & Co., to the bill of complaint of
13 John J. Vinton, John Fisher, William McGilarry, and Thomas E. Blunt, complainants.

The said defendants, now and at all times hereafter saving and re serving unto themselves all benefits and advantage of exception which

can or may be made or had to the many errors, uncertainties, and other imperfections in the said complainants' bill of complaint contained, for answer thereunto, or unto such parts or so much thereof as these defendants are advised it is or are material for them to make answer unto, these defendants, answering, say:

That they know not, and have not been informed, save by complainants' said bill of complaint, whether or not the letters patent to said John J. Vinton, dated the 14th day of October, 1873, and numbered 143600, set up and mentioned in the said complainants' said bill of complaint, were issued to said John J. Vinton, or what was the specifications or description of his said alleged and pretended discovery or invention to said letters patent annexed.

But these defendants believe that said letters patent were issued to said John J. Vinton for some alleged and pretended invention or discovery of some new and useful way, manner, or method of reducing iron from the slag or refuse of blast or smelting furnaces.

For greater certainty, however, defendants crave leave to refer to said letters patent, and the specification and schedules, when the same shall be produced.

14 These defendants further say that they know not, and have not been informed, save by the complainants' said bill, and hence cannot set forth as to their belief, or otherwise, whether or not the alleged assignments by said John J. Vinton to said John Fisher, William McGileroy, and Thomas E. Blunt, as set forth in said bill, were made and recorded as alleged.

These defendants, in further answering, say that they deny that said John J. Vinton was the original or first inventor or discoverer of said alleged and pretended new and useful improvement in the manufacture of iron from furnace slag, or from the slag or refuse of blast or smelting furnaces, as alleged and pretended, as the said defendants hereinafter more fully and specifically set forth and show.

These defendants, in further answering, say that they deny that said John J. Vinton, or any other person or persons, ever discovered or invented any process, way, manner, or method of extracting, or reducing, or manufacturing iron from furnace slag or from the slag or refuse of blast or smelting furnaces.

These defendants, in further answering, say that they deny that they, or either or any of them, at any time, either before or after the commencement of this suit, at said Youngstown, Ohio, or at any other place or places, ever made or manufactured, or caused to be

15 made or manufactured, a large quantity of iron from blast-furnace slag, or from the slag or refuse of blast or smelting furnaces, in the same or substantially the same way or by the same method or process, as described in the schedule or specification accompanying or forming part of said alleged and pretended letters patent.

And these defendants further deny that they, or any or either of them, at any time or at any place, ever made or caused to be made, or manufactured or caused to be manufactured, any iron, in any quantity whatever, from blast or smelting furnace slag, or from the slag or refuse of blast or smelting furnaces, in the same way, or by the same method, or in substantially the same way, or by substantially the same method or process, as described in the schedules or specifications of said alleged and pretended letters patent, or in any other way or manner, or by any other method or process whatsoever.

These defendants, in further answering the said bill of complaint, say that they deny that they have in any way or manner whatever infringed

the said alleged letters patent, or any rights or privileges thereby secured, or intended to be thereby secured, or granted to said John J. Vinton, and deny that they have in any manner whatever attempted or threatened to infringe the said alleged letters patent, or any rights or privileges thereby granted or secured to said John J. Vinton,
16 and deny that they are about to infringe, or are preparing to infringe, upon any letters patent, or upon any rights or privileges granted or secured by said alleged letters patent.

These defendants, in further answering, say that they deny that said complainants have been damaged or impaired in any manner or in any amount whatever by or on account of any acts of defendants, or any or either of them, as alleged in their said complaint, or otherwise; and deny that complainants have any good or just reason, or any reason whatever, to fear that they will be damaged or injured by any act or acts of defendants, as alleged in said complaint, or otherwise.

And these defendants, in further answering, say that they deny that they, or any or either of them, have confederated with any other person or persons to divest or destroy any rights or privileges granted or secured to complainants by said alleged letters patent and assignments thereof.

These defendants, in further answering complainants' said bill of complaint, say that while it is true that they now are, and for a long time prior to the date of said alleged letters patent have been, in their foundry and machine works, in the city of Youngstown, Mahoening County, Ohio, using the runners from blast or smelting furnaces in precisely the same way and manner that they now, and always heretofore have, used
17 other *other* materials for the manufacture of castings at said foundry and machine works, and in precisely the same way and manner that said runners from blast and smelting furnaces have been used in cupolas and blast furnaces for more than thirty years last past, as hereinafter more fully and particularly set forth and specified, these defendants deny that such use, or way, or manner, or method of use is the invention or discovery of the said John J. Vinton.

These defendants, in further answering, aver that said runners from blast or smelting furnaces so as aforesaid used by these defendants, in the way and manner aforesaid, are a substance mainly composed of iron, and in that portion of the iron, mingled with small quantities of other matters, which adheres to and cools and hardens in the trough or gutter extending from the stack of a blast-furnace to the pig-bed, in and during the process of casting or drawing the molten iron from said furnace-stack into said pig-bed.

And defendants further aver that said furnace runners above described are not furnace slag, nor slag, nor refuse from blast or smelting furnaces, nor have said runners ever been known as, or called, furnace slag, or slag, or refuse from blast or smelting furnaces.

18 And these defendants further aver that said runners from blast or smelting furnaces above mentioned and described are not embraced or included in said alleged letters patent issued to said John J. Vinton, or in or by any schedule or specification accompanying the same; and they aver that no letters patent were ever issued to said John J. Vinton, or to any other person or persons, for any method or process, or any invention or discovery of any method or process, of reducing, making, or manufacturing iron from said runners from blast or smelting furnaces.

These defendants, in further answering, say that in the aforesaid use by them of said runners from blast and smelting furnaces they have not

made, reduced, or manufactured, nor caused to be made, reduced, or manufactured, any iron therefrom in the same way, manner, method, or process, or in substantially the same way or manner, or by substantially the same method or process, as described in said alleged letters patent, or the schedule or specifications accompanying or forming part of said alleged letters patent.

These defendants, in further answering, aver, upon personal knowledge and upon information and belief, that the use of said runners from blast and smelting furnaces, in exactly the same way and manner, and by exactly the same method and process, in which said runners now
19 are and have been used by these defendants, was well known publicly and in general use long prior to the date of said alleged letters patent, and long prior to any alleged or claimed invention or discovery by said John J. Vinton, and for more than twenty years prior to the date of his application for said alleged letters patent, at the following-named places and by the following-named persons and companies, to wit:

By Joshua Crowther, manager and founder for Reis, Brown and Berger, at their blast-furnace at the borough of New Castle, Lawrence County, Pennsylvania; and that said prior use was well known to said Joshua Crowther and to George C. Reis and A. B. Berger, all of whom reside at said New Castle, and to William H. Brown, who resides at Pittsburgh, Pennsylvania, and to their workmen and employees at said furnace.

Also by Charles Duffy, manager and founder of the Ætna Furnace at said New Castle, and by Samuel Kimberly, the owner of said furnace; and that said prior use was well known by said Charles Duffy and Samuel Kimberly, who reside at Sharon, Mercer County, Pennsylvania, and said prior use at said Ætna Furnace was also well known by Robert Lowry, who was also founder of the same, and who resides at said New Castle, Pennsylvania.

20 Also at the "Harry of the West Furnace," in Mercer County, Pennsylvania, by Joseph G. Butler, sen., and by David Himrod, and their employees and workmen at said furnace; and that said prior use was well known by said Joseph G. Butler, sen., who resides at Warren, Trumbull County, Ohio, and by said David Himrod, who resides at Girard, Erie County, Pennsylvania, and by their said employees and workmen, more than twenty years ago.

Also at the blast-furnaces of James Ward & Co., at the town of Miles, Trumbull County, Ohio, by said George C. Reis, James Ward, sen., William Ward, Thomas Carter, and James Ward, junior; and said prior use, fifteen years and more ago, was well known by said James Ward, sen. (now deceased), and by said William Ward, Thomas Carter, and James Ward, junior, all of whom reside at said town of Miles, and by said George C. Reis, who lives at said New Castle, Pennsylvania.

Also at Spenange Blast Furnace, at West Middlesex, Mercer County, Pennsylvania, by Elmer T. Reed, the founder of said furnace, and by George Boyce, Alfred Curtis, J. M. Quin, and Simon Perkins; and said prior use was well known by said Elmer T. Reed, who resides at said West Middlesex, and to said Boyce, Curtis, Quin, and Perkins, all of whom reside at Sharon, Mercer County, Pennsylvania.

21 Also at Wheatland, Mercer County, Pennsylvania, by John J. Spearman, founder for Wheatland Iron Company, at the Wheatland Iron Company's furnace at said place, and by said John J. Spearman, at Spearman Iron Company's furnace, at Sharpsville, Mercer

County, Pennsylvania, of which furnaces the said John J. Spearman was founder and manager; and said prior use was well known to said John J. Spearman, who resides at Sharon, Mercer County, Pennsylvania.

Also at Struthers Iron Company's furnace, at Struthe's, Mahoening County, Ohio, by Thomas Struthers, Thomas W. Kennedy, John Stambaugh, and John Stewart, owners of said furnace; and said prior use was well known by said Thomas Struthers, who resides at Warren, Warren County, Pennsylvania, by said Thomas W. Kennedy and John Stewart, who reside at said Struthers, and to said John Stamburgh, who resides at the city of Youngstown, Mahoening County, Ohio, and to the workmen and employees of said Struthers Iron Company, who reside at said Struthers.

Also at the Clay Furnace, thirty years ago, at Mercer County, Pennsylvania, by said David Himrod and by Alexander M. Byres and their employees at said furnace; and said prior use thirty years ago was well known by said David Himrod, at Girard, Erie County, Pennsyl-
22 vania, and to said Alexander M. Byres, who resides at Pittsburgh, Pennsylvania, and to the employees and workmen at said Clay Furnace.

Also at the Westerman Iron Company's furnaces, at Sharon, Mercer County, Pennsylvania, by Allen Lewellyen, founder thereof, and by James Westerman and Peter W. Keller, two of the owners thereof; and said prior use was well known to said Allen Lewellyen and James Westerman, who reside at said Sharon, and to said Peter W. Keller, who resides at Cleveland, Ohio.

Also at the Falcon Furnace and Phœnix Furnace, at the city of Youngstown, Mahoening County, Ohio, and by Brown, Bonnell and Company, by said Brown, Bonnell and Company, and by Job Froggett, the founder of said furnaces; and that said prior use was well known more than ten years ago to Joseph H. Brown, Richard Brown, Thuney Brown, and William Bonnell, members of said company of Brown, Bonnell & Co., and by said Job Froggett and William Pollock, Patrick Kennedy, Charley McGuim, and Cornelius O'Donnell, all of whom reside at said city of Youngstown, Mahoening County, Ohio.

Also at the old Brier Hill Furnace, in the township of Youngstown aforesaid, by said Brown, Bonnell and Co., and by Thomas W. Pollock and William Pollock, for more than ten years; and said prior use
23 was well known by said Joseph N. Brown, Thomas M. Pollock, and William Pollock, all of whom reside at said Youngstown, Ohio.

Also at the Eagle Furnace, in said township of Youngstown, Ohio, by said Thomas M. Pollock, William B. Pollock, Henry Manning, and James O'Hara, at said Eagle Furnace, for more than ten years last past; and said prior use was well known during all of said time by said Thomas M. Pollock, William B. Pollock, William Pollock, Henry Manning, and James O'Hara.

Also at the furnace of the Himrod Furnace Company, at said Youngstown, Ohio, by David Himrod, Cornelius O'Donnell, Carson Davis, Augustus B. Cornell, and William Himrod; and said prior use was well known to said David Himrod, who lives at Girard, Erie County, Pennsylvania, and to said Cornelius O'Donnell, Augustus B. Cornell, and William Himrod, who reside at said Youngstown, Ohio, and to said Carson Davis, who resides somewhere in the State of Pennsylvania, the exact place being unknown to defendants.

Also at the furnace of Girard Iron Company, at Girard, Trumbull

County, Ohio, by William Richards and Joseph G. Butler, jr.; and such prior use was well known to said William Richards, who resides at Warren, Trumbull County, Ohio, and to said Joseph G. Butler, jr., who resides at Youngstown, Ohio.

Also at Beaver Falls, Beaver County, Pennsylvania, at the
24 foundry of the Beaver Falls Foundry Association, by said association, and by Robert Paisley, superintendant thereof, who resides at said place; and said prior use in foundry cupolas was well known to said association and to said Robert Paisley, and to their employees and workmen, residing at said place.

Also at New Castle, Lawrence County, Pennsylvania, at the iron works of McCormick, Peebles, Brown and Co., by Joseph H. Brown, now residing at Youngstown, Ohio, and Robert Peebles, who resides at said New Castle, Pennsylvania; and said prior use was well known, in foundry cupolas, to said Brown and Peebles, and to their employees, residing at said New Castle, for more than ten years last past.

Also at Sharon, Mercer County, Pennsylvania, by John Enwright, since the year 1870; and said prior use was well known to said Enwright, in foundry cupolas, since 1870.

And also at Bardentown, State of New Jersey, by William McFarland; and such prior use in cupolas was well known to said William McFarland, who resides at said Bardentown, State of New Jersey.

And these defendants also say that said use was known publicly, and said material was used by them, as aforesaid, in Youngstown, Mahoening County, Ohio, at their said foundry and machine works, long prior to the date of said alleged letters patent, and that said
25 prior use was well known to all of these defendants, and to said Thomas W. Kennedy, in foundry cupolas, long prior to said alleged letters patent.

And in further answering, these defendants, upon information and belief, aver that the said alleged letters patent issued to said John J. Vinton are null and void in every respect so far as they purport to confer upon him and his assigns (if they do purport to confer upon him and his assigns) a sole and exclusive right to use, and vend to others to be used any way, manner, or method of reducing or manufacturing iron from furnace runners, and so far as any claim of any invention or discovery of any way or method of reducing or manufacturing iron from furnace runners and from the slag or refuse of blast or smelting furnaces.

These defendants further aver that, in reducing and manufacturing iron from said furnace runners, as aforesaid, they never have, and do not now use said runners in connection with scrap-iron, or other oxidized iron, or scale or black oxidized iron, nor do they make said runners granular or spongy, by passing water or air through them when in a molten state, or in any other way; but, on the contrary, they use the same as pig-iron and scrap-iron are commonly used in cupolas,
26 with the addition of a small quantity of fluxing material, or limestone.

And these defendants deny that the said complainants are entitled to the relief they pray for in their said bill, and pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

THOS. W. SANDERSON,
Sol. for Respondents.

NORTHERN DISTRICT OF OHIO:

Homer Hamilton, one of the above-named defendants, being duly sworn according to the law, upon his solemn oath says that the statements contained in the foregoing answer, so far as they are within his own knowledge, are true, and so far as they are derived from information he verily believes them to be true in substance, exact as stated.

HOMER HAMILTON.

Sworn to before me, and subscribed in my presence by said Homer Hamilton, this 5th day of October, A. D. 1874.

H. W. JONES,
U. S. Com'r, Northern Dis't Ohio.

Filed Oct. 10, '74.

27 In the United States circuit court, northern district of Ohio.

JOHN J. VINTON, JOHN FISHER, WILLIAM McGilvery, and Thos. E. Blunt
vs.
HOMER HAMILTON, FREDERICK GERWIG, JOHN Stambaugh, William Tod, doing business as Homer Hamilton & Co.
} In equity.

The complainants hereby join issue with the defendants.

A. McCALLUM,
Sol'r for Comp'ts.

To the clerk U. S. C. C., northern district of Ohio.
Filed Oct. 31, '74.

28 In the United States circuit court, northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON ET AL.
} In equity.

The parties aforesaid hereby agree that either party so desiring, upon giving ten days' notice in writing to the other party of the time and place of examining witnesses, may take testimony before any legally appointed notary public, the aforesaid parties in such case hereby waiving any longer or further notice, such testimony to be read in like manner as though duly taken on commission or otherwise before an examiner or commissioner duly appointed within the northern district of Ohio.

All such notices on the part of the complainants to be served upon Thomas W. Sanderson, of Youngstown, Mahoening County, Ohio, attorney for defendants, and such notice on the part of the defendants to be served upon Andrew McCallum, of Washington City, District of Columbia, attorney for complainants.

November 19th, 1874.

A. McCALLUM,
Sol. for Comp'ts.
THOS. W. SANDERSON,
Sol. for Def't's.

Filed Dec. 2, '74.

29 In the circuit court of the United States, northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON ET AL.

The complainants are hereby notified that on the 26th day of August, A. D. 1875, the said defendants will file in said cause, in said court, an amendment to the answer of said defendant, setting up in substance that said claimed process of utilizing furnace runners, slag, cinders, and débris of blast-furnaces was well known and used by N. B. Hatch, who resides in Alleghany City, Alleghany County, Pennsylvania, in and during the year from A. D. 1844 to 1846, at Jackson Furnace, Venango County, Pennsylvania, in an ordinary foundry cupola.

That the use of said material in furnaces was also well known to Allen Hallawell long prior to the date of said prentended letters patent; that said Hallawell resides at Youngstown, Ohio.

August 24th, 1875.

THOS. W. SANDERSON,
Att'y for Def'ts.

To A. MCCALLUM, Esq., *Sol. for Comp'ts.*

Filed Nov. 3, '75.

30 Journal 7th, 394.

On motion of said defendants it is ordered that leave be granted them to file an amendment to their answer instanter.

Amendment to answer.

In the circuit court of the United States, northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON & CO.

The said defendants, by leave of the said court first had herein, for amendment to their answer of the defendants, say that said prior use of said furnace slag and cinders and refuse of blast-furnaces, in the same way and manner as set forth, mentioned, and described in the said pretended letters patent and schedule thereto, was well known and used long prior to the date thereof to one N. B. Hatch, who resides in Alleghany City, Alleghany County, State of Pennsylvania, in and during the years A. D. 1844 to A. D. 1846, inclusive, at Jackson Furnace, in Venango County, in the State of Pennsylvania, in and by an ordinary foun ry cupola, erected by him, the said N. B. Hatch, for the purpose of melting said slag, runners, and refuse of said blast-furnace and making castings and pig-iron therefrom.

31 That said prior use of said furnace runners, slag, and refuse of blast-furnaces was well known to and used long prior to the date of said pretended letters patent to one Allen Heland, who resides at the city of Youngstown, Mahoening County, Ohio, at the said city, and elsewhere in said county of Mahoening, in the State of Ohio.

THOMAS W. SANDERSON,
Att'y for Defendants.

THE STATE OF OHIO,
Mahœning County, Northern Dist. of Ohio:

The above-named Homer Hamilton, one of the above-named defendants, being duly sworn, on oath says that the matters and things stated in the foregoing amendment to the answer of defendants in said cause stated upon personal knowledge are true, and those stated upon information and belief he believes to be true.

HOMER HAMILTON.

Sworn to and subscribed by said Homer Hamilton before me this first day of November, A. D. 1875.

A. W. JONES,
U. S. Commissioner, Northern District of Ohio.

Filed Nov. 3, '75.

32 In the circuit court of the United States for the northern district of Ohio.

JOHN J. VINTON ET AL. }
vs. } In equity.
HOMER HAMILTON ET AL. }

The complainants, by their solicitor, A. McCallum, suggests the death of William McGilvray, one of said complainants, and that David R. Shiras, Calvin W. Ray, and Louis Buchholz, all of Sharon, in the county of Mercer, in the State of Pennsylvania, have been duly appointed administrators.

Your petitioners therefore pray that the said David R. Shiras, Calvin W. Ray, and Louis Buchholz, administrators, be made parties to this suit in place and stead of said William McGilvray, deceased.

A. McCALLUM,
Solicitor for Complainants.

EARL BILL, Esq.,
Clerk U. S. C. C., Cleveland, Ohio.

Filed July 25, '77.

33 And afterwards at the April term, 1877, to wit, on the 25th day of July, A. D. 1877, the following order was entered in said case:

Journal 8, 530.

On motion of said complainants, by their solicitors, and it being suggested by the court that since the commencement of this action the said complainant William McGilloray has deceased, and that David R. Shiras, Calvin W. Ray, and Louis Buckholz, all of Sharon, Mercer County, Pennsylvania, have been appointed as administrators of the estate of the said William McGilloray, it is ordered that said David R. Shiras, Calvin W. Ray, and Louis Buckholz, administrators as aforesaid, be made parties complainant herein instead of the said William McGilloray.

And afterwards, at the April term, 1878, viz., on the 12th day of September, A. D. 1878, the following decree was rendered in said cause:

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON ET AL. } No. 2597. In equity.

This cause having come on to be heard upon the pleadings, exhibits, and evidence, and the argument of counsel, and the court, being fully advised in the premises, do find that the process described in the letters patent exhibited with complainants' bill was known and in common use before the complainants' application for said letters patent, and that said letters patent were and are now null and void. It is therefore ordered, adjudged, and decreed that complainants' bill be dismissed, with costs, &c.

34 Depositions of witnesses examined on behalf of complainants, pursuant to the annexed notice, and the stipulations therein referred to, at the office of Joseph McClure, notary public, residing in the borough of Sharon, within the county of Mercer and State of Pennsylvania, on the 17th day of December, A. D. 1874, between the hours of 10 o'clock a. m. and six o'clock p. m. Present, A. McCallum, solicitor for complainants.

The hour of 10 having arrived, the examination of witnesses was proceeded with, with the understanding that if Thomas W. Sanderson, solicitor for defendants, should appear during the course of the examination that he should have an opportunity of cross-examining witnesses previously called.

BANARD BRANNON, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by A. MCCALLUM, counsel for complainants, as follows:

Q. What is your name, age, residence, occupation, or trade?

A. My name is Banard Brannon; am fifty-five years of age; reside in the borough of Sharon, Mercer County, Pennsylvania, and am by occupation a boiler-maker by trade; at present am employed in digging cinders.

Q. What do you mean by cinders?

A. Slag from cinder piles from blast-furnaces.

Q. How long have you been so employed?

A. Commenced sometime last summer, as near as I remember.

35 Q. Did you ever dig any of that material for any one before that time?

A. No, sir; I did not.

Q. Describe where you obtained this slag, and in what positions you found it and have seen it in this neighborhood.

A. Sometimes I find it lying on top of cinder piles, sometimes on the bottom, and sometimes through the dumps all over.

Q. Whose cinder piles do you refer to?

A. To Westerman Iron Company's, at Sharon, Pa., on the canal or near there, in the dump—thrown out; this was near Westerman Iron Co.'s furnace, where they had hauled out the cinder and slag and thrown it away. I took out of Railroad street, between State street and Messesmith's Hotel, in a space of some nine feet wide and sixty-five feet long, between eight or nine tons of slag; this is in the said borough of Sharon. It had been used in the making of the street; was put there about the fall of 1873; it was used in repairing the street.

Q. Do you know where this material came from which was put on the street and afterwards dug up by you?

A. From the Westerman Iron Company's furnaces.

Q. Are there any other places from which you have dug up this material or slag?

A. Yes; on Reno street, in front of the school-house, in Sharon afore said; I took about eleven tons out of the sides of this street; did not dig any in the center.

36 Q. Have you dug up this material or slag at any other place in Sharon?

A. Yes; on the bank of the river, west side, on land of William J. Thompson, he having given me permission to do so; it had been thrown there to protect the river-bank.

Q. In what position have you seen this material or slag in?

A. In walls along the railroad; also along a railroad or wall made on which a railroad track was laid. This was at Sharpsville, Mercer County, Pa.

(Witness was here shown specimen No. 1, which is offered in evidence and marked Exhibit A.)

Q. Examine the said specimen now shown you, and marked Exhibit A, and state whether or not that is the slag or kind of material which you have been digging, and about which you have testified.

A. Yes, sir; this is the kind of material, but I got some pieces a great deal larger of the same material.

Q. What did you do with the material after digging it?

A. I sold it to Mr. Vinton; I made a bargain with them to take all that I could get.

Q. Are you familiar with the method of casting pig-iron? Have you seen it done, and do you know how it is done?

A. I have some little knowledge of it; have seen them cast frequently. I know how the sand mould is made.

37 Q. Please look at this drawing marked Exhibit B and state whether it is a correct representation of the sand mould used in casting pig-iron, marking thereon by the pen, in letters, the different parts of the same.

A. This plat marked Exhibit B is a correct representation of the sand mould used in casting pig-iron. The letter A which I now make represents the furnace; the letter B represents the trough; the letter C represents the runner which runs the metal into the sow, which I mark D, and the letter E represents pig-beds.

(By direction of the witness, Joseph N. McClure, notary public, makes more distinct letters designating the parts of Exhibit B than the witness himself can make, said letters being distinguished as A, B, C, D, and E.

Q. Do you know of any other thing material to the issue in this case?

A. I do not.

BENARD BRANNON.

JOHN T. JONES, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by counsel for complainants, as follows, to wit:

Q. What is your name, age, and occupation?

A. My name is John T. Jones; am twenty-seven years old; reside at Sharon, Mercer County, Pa.; am by occupation an engineer, and for the last nine months have been an assistant furnace-man.

38 Q. Are you familiar with the method of casting pig-iron, and do you know how the moulds are made, and the technical names given to the several parts of the same?

A. I do.

Q. Look at drawing marked Exhibit B, and say whether that is a correct representation of the sand mould used in casting pig-iron?

A. It is.

Q. Describe the parts by the letters on the drawing.

A. The letter A represents the furnace, B the trough, C the runner, D the sows, and E the pig-beds.

Q. What is the trough made of?

A. Metal.

Q. How is the runner formed?

A. The runner C is made in the sand by means of a ravel or hook; the sows and peg-beds are made by patterns in the sand.

Q. Do I understand you to say that the runner portion is made by moulding in the sand, and that is what is called the runner in this method of casting pig-iron?

A. The runner is made by ravelling in the sand or by drawing the ravel in the sand.

JOHN J. JONES.

ALLEN C. PATTON, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by counsel for complainants, as follows, to wit:

Q. What is your name, age, residence, and occupation?

39 A. My name is Allen C. Patton; am forty-one (41) years old; reside at Sharpsville, Mercer County, Pa.; am by trade an engineer; am now hauling cinders for Vinton; I mean runners or furnace slag, what they have thrown out in the dumps from blast furnaces.

Q. When did you commence the business?

A. Can't tell exactly, but think about the first of May or June, 1874.

Q. Did you ever dig as well as haul it?

A. Yes, I have; the first I did was with Wm. Hoffins; after this I hauled the slag for Hoffins.

Q. Describe or state where you got this slag.

A. At Mount Hickory Furnace, in Sharpsville, Mercer County, Pa.

Q. Where did you get it?

A. Out of a cinder pile where it had been dumped for some three years; I and others had dumped it there; was employed by Mount Hickory Furnace and we dumped it, because I had a contract for hauling out the cinder, and hauled it out with cinder; supposed it to be of no account; I commenced to haul out this cinder-slag and dumped it as above described about three years ago last November, and continued to do so until the furnace stopped, which was about last February or March.

Q. (Witness shown specimen marked Exhibit A.) Please state if this is the kind of material you have been digging and hauling as stated by you.

A. Yes; this is about an average run of the slag; some is better and some is not so good.

Q. What position do you find this slag in?

40 A. This slag is found mixed all through the dump, perhaps on the top, in the centre, or bottom of the dump; it is not divided up or saved, but thrown away as we do the cinder.

Q. Where else have you seen this slag except in the dumps?

A. Have seen it on the streets where they have used it in making or filling up streets.

Q. What do you do with this slag after you dig it?

A. I haul it to Sharon or deliver it to Vinton and Co.

ALLEN C. PATTON.

WILLIAM MORRIS, being duly sworn, deposes and says, in answer to interrogatories proposed to him by counsel for complainants, as follows, to wit:

Q. What is your name, age, residence, and occupation?

A. My name is William Morris; am twenty-six years old; reside at Hickory township, Mercer county, Penn'a; am by trade a moulder.

Q. Do you know how to make the moulds for casting pig-iron; if yes, state how it is made, and if drawing Exhibit B, is a correct representation thereof?

A. I do know how to make moulds for casting pig-iron. They are made as follows: Would commence at the furnace or cupola and make a runner down to the mould; then would build your small runner into the sows; would then make the sows with a long pattern; then would make the moulds for the pigs. This is all made in the sand. The drawing, marked Exhibit B is a correct, or nearly correct, representa-
41 tion of the mould; sometimes at blast-furnaces they use chills *coke all* made out of cast-iron, and may be termed moulds.

Q. When these chills or cast-iron moulds are used, are they of smaller shape to the sand mould, or how are they made?

A. The runner is usually made in the sand, but the balance would be arranged the same as the sand moulds. The runner is still made in the sand; the middle portions are the sow and pig-beds, which are arranged similar to the sand mould of the sow and pig-beds.

Q. Then, in your experience, what is *what is* called the runner is always made of sand?

A. Yes, sir.

WILLIAM MORRIS.

DAVID DONNAN, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by counsel for complainants, as follows, to wit:

Q. What is your name, age, and occupation, and where do you reside?

A. My name is David Donnan; am forty-one years old; reside in Wheatland, Mercer County, and State of Pennsylvania; my occupation is a locomotive engineer; my present employment is a locomotive engineer.

Q. Are you also employed in any other business?

A. Have men employed in the business of collecting furnace slag.

42 Q. How long have you had men employed in the business of collecting furnace slag?

A. About one year.

Q. Did you ever collect, or cause to be collected, or hear of being collected, this material by others prior to December, 1873?

A. I did not myself, but knew of its being collected prior to December, 1873. I weighed some prior to that time for Micha'l Lance.

Q. When was this?

A. In the summer of 1873. I can't give any certain date.

Q. Where do you get this material?

A. We dig it out of the cinder banks made from blast-furnaces, when it has been hauled out and thrown away.

Q. State the different dumps where you get it out of.

A. One by the side of the railroad, in Wheatland aforesaid; another at the same place, but near the tail end of the mill at Wheatland; another at the end of the puddle-mill, and different places about Wheatland where cinders have been dumped.

Q. Have you seen it elsewhere than in the cinder piles?

A. Yes; when the cinder has been hauled out on the streets. You will find at any and all places where furnace cinder has been hauled out on the street or elsewhere. It is sometimes used for filling mud holes in the streets.

Q. (Witness here examines specimen marked No. 1, Exhibit A.) Is this the same material?

A. Yes, it is.

43 Q. What disposition do you make of it after digging it?

A. I sell it.

Q. To whom do you sell it?

A. To the Vinton Slag Company. Have sold some to Homer Hamilton and Company, of Youngstown, Ohio.

Q. When was that?

A. I think I commenced to sell to them in January or February, in the year 1874.

Q. Was there any difference in the material sold to Homer Hamilton and Company and that sold to Vinton and Company by you?

A. No, sir; it is the same thing.

Q. Do you know of what use the firm of Homer Hamilton and Company put this material to, or that of Vinton Slag Company?

A. No, sir; I do not know of my own knowledge; they say they melt it over again.

DAVID DONNEN.

GEORGE K. MOORE, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by counsel for complainants, as follows:

Q. What is your name, age, residence, and occupation or trade?

A. My name is George K. Moore; am thirty-eight years old; reside at Sharpsville, Mercer County, Pa.; am a common laborer.

Q. What is your present employment?

A. I am hauling slag to Messrs. Vinton and Co.

Q. How long have you been so employed?

44 A. About ten months; commenced in February, 1874, as near as I can tell.

Q. What business were you engaged in prior to February, 1874?

A. I hauled cinder from the blast-furnace.

Q. What did you do with the cinder which you hauled from the blast-furnaces?

A. I dumped it into dumps in hollows on the street, the hand'est place to get rid of it.

Q. How long did you work at this business?

A. Some two or three years.

Q. Where have you been digging this slag which you hauled to Vinton and Company?

A. At Sharpsville, Mercer County, Pa.

Q. From what furnace at Sharpsville?

A. From Sharpsville Furnace; from what is known as the old Sharpsville Furnace.

Q. Have you ever dug any of this slag from the places where you before dumped it when engaged in the business of hauling cinder from the blast-furnace?

A. Yes, I did; lots of it.

Q. Can you produce a specimen of this slag which you are digging and hauling to Vinton and Co.'s?

A. I can. (Witness here produced specimen No. 2, which is offered in evidence and marked Exhibit C.)

Q. Where did you find this specimen?

A. In Sharpsville aforesaid.

Q. State where you have seen this slag in other places than at Sharpsville, and in what positions you have seen or found it.

45 A. You find it all through the cinder from blast-furnaces. You generally find nearly a cart-load at a place. I have seen it on the road where cinder has been thrown; have picked it up off the streets in Sharpsville, where it had been thrown with the cinder; have seen it built into walls at the Douglass Furnace, at Sharpsville aforesaid.

Q. How long have you known the old Sharpsville Furnace to be running?

A. Some ten or eleven years. I have dug this slag from dumps made by said furnace more than ten years ago, said dumps being some forty-five feet deep on the slope, and where exposed to the weather the surface was covered by moss.

Q. (Witness here produces specimen marked No. 3, Exhibit D; also specimen No. 4, marked Exhibit E.) Look at these specimens No. 3 and 4, and say when they were found by you, and whether or not they are moss-grown, as before testified by you.

A. The men I had working for me dug them out of the dumps four or five days ago; out of the old Sharpsville Furnace dumps; they are moss-grown.

Q. Before you commenced to dig this material for Vinton and Company do you know or have you heard of any one having collected it before?

A. No, sir.

Q. When you were engaged in hauling cinder from blast-furnaces, and before you commenced to dig this slag for Vinton and Company, was there any distinction made between this particular kind of slag and the other slag or cinder which you hauled from the furnace?

46 A. No; we treated it just alike.

GEORGE K. MOORE.

WILLIAM TOWAND, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by counsel for complainants, as follows, to wit:

Q. What is your name, age, residence, trade or occupation?

A. My name is William Towand; am forty-one years old; reside at Sharon, Mercer County, Pa.; am by trade a moulder.

Q. How long have you been in that business?

A. About twenty-five years.

Q. Are you familiar with the method of casting pig-iron?

A. I am.

Q. Look at drawing Exhibit B, and say if that is a correct representation of the sand moulds used in casting pig-iron?

A. Yes; it is.

Q. Describe it.

A. A represents the furnace, B the trough, C the runner, D the runners to run it to the pigs (we call it the sow), E represents the pigs.

Q. How do you make the runner that leads from the trough?

A. We make it of sand; we generally have a piece or pattern to work by.

Q. Has this runner always been called a runner, as long back as you can recollect?

A. Yes, sir.

Q. When you hear of any one speak of a runner in connection with a furnace from which pig-iron is cast, what do you understand to be meant by the term runner?

47 A. I understand it to be that part of the trough which the iron runs to fill up the pig-bed moulds.

Q. Have you ever heard any other meaning given to the word runner in this connection?

A. I have not.

his
WILLIAM + TOWNAND.
mark.

Attest:
J. N. McCLURE.

SAMUEL MCNALLEY, being duly sworn, doth depose and say in answer to interrogatories proposed to him by counsel for complainants as follows:

Q. What is your name, age, residence, and trade, or occupation?

A. My name is Samuel McNalley; my age is forty-two years; reside in Sharon, Pa.; my trade is that of an iron moulder.

Q. How long have you been in that business?

A. About twenty-four years.

Q. Are you familiar with the mode of casting pig-iron?

A. I am.

Q. Please look at drawing Exhibit B and say if that is a correct representation of the sand mould in which pig-iron is cast.

A. Yes, sir; it is a fair representation.

Q. Describe the several portions of which that mould is constructed by the letters on the drawing, giving each portion its technical name, or the name by which it is known by those skilled in the art.

48 A. A represents the furnace, B the trough, C the runner, D the sow, and E the pigs.

Q. How is that mould made?

A. In the sand patterns are used for the sow and pigs, the bed of the runner is marked out with a hook, and the sides are finished with a shovel, the bottom of the runner is finished up with ravel.

Q. Have you ever heard any other meaning given to the word runner, when used in connection with the process of casting pig metal, excepting in referring to this portion of the mould?

A. No, sir; it is always called the runner, and has always been called the runner since I have had any knowledge of a blast furnace.

SAMUEL MCNALLEY.

JOHN KOLB, being duly sworn, doth depose and say in answer to interrogatories proposed to him by counsel for complainants as follows, to wit:

Q. What is your name, age, residence, trade, or occupation?

A. My name is John Kolb; am thirty-eight years old; reside in Sharpsville, Mercer County, and State of Pennsylvania; by trade am a moulder.

Q. Have you been at any time employed in digging slag for Messrs. Vinton and Co.? If so, state when and where.

A. Yes, sir; I have. I commenced to dig slag at Sharpsville about February, 1874; I made a contract with Mr. Vinton to di*d* and haul slag for Vinton and Co. in the month of December, 1873.

49 Q. Where did you get the first slag you dug and hauled to Messrs. Vinton and Co. from?

A. From Mr. Allen's furnace at Sharpsville, Pa. I also got some at the Mount Hickory Furnace at Sharpsville; also got some at the old Sharpsville Furnace; also from furnace at Sharpsville owned by J. Wormsoy et al.; also from what is known as the dump at the Douglass Furnace in Sharpsville, and have also hauled slag off the streets in Sharpsville, also from the dumps at the Clay Furnace about two miles from Clarksville, Mercer County, Pa.; said furnace has been out of blast for more than eleven years. The dump when I commenced to work on it was all covered over with grass and moss. I also got slag at the dumps at the Etna Furnaces in New Castle, Pa. I also got some from furnace of Boyce, Rall and Co., one mile above Sharon, Pa.

Q. Please look at specimens Nos. 1, 2, 3 and 4, marked Exhibits A, C, D and E, and sa*w* whether or not that is the slag you have been digging at the places you have testified to.

A. Yes, sir; these are specimens of the slag I have been collecting, or are the same material.

Q. In your experience as a moulder did you become familiar with the mode of casting pig-iron?

A. Yes; I did.

Q. Look at drawing Exhibit B and say if that is a correct representation of a sand mould in which pig-iron is cast.

A. Yes, sir; it is.

Q. Describe the parts of the mould by the letters on the drawing.

50 A. The letter A represents the furnace, the letter B represents the trough, the letter C represents the runner, the letter D represents the sows, & the letter E the pig beds.

Q. Did you ever hear the runner called by any other name?

A. No, sir; I never did.

Q. What is the use of the runner?

A. To run the iron out of the furnace into the pig beds.

Q. When in your business as a moulder, and before you commenced to dig this slag for Vinton and Company, did you ever hear this slag called a runner or runners?

A. Not to my knowledge.

Q. Since you commenced to di*d* this stuff or material, have you heard it called runner or runners?

A. Yes; I have heard it called runners, and different names.

JOHN KOLB.

WILLIAM BRANNEN, being duly sworn, deposes and says in answer to interrogatories proposed to him by counsel for complainant as follows:

Q. What is your name, age, residence, and occupation?

A. My name is William Brannen; am thirty years old; reside at Sharon, Pa.; am by trade a boiler-maker.

Q. Have you been employed by Messrs. Vinton and Co. in digging this slag? If so, when and where you found it.

51 A. I was employed by Vinton and Company to dig and gather this slag. First dug it at Sharon Furnace; have found it in different places in banks twelve or fourteen feet deep; got some out of the canal, some in the river; all of the above was at and near the Sharon Furnace. Next got it at the Valley Furnace; found it from two to five feet deep there, on the roads and in the banks. Next got it at West Middlesex, Mercer County, Pa.; found it in banks from four to ten feet deep. Also dug it at the Westerman Iron Company's furnaces at Sharon, Pa.

(Witness here produces specimen No. 5 marked Exhibit F, which is offered in evidence.)

Q. Where do you find slag or material of this kind marked Exhibit F, specimen No. 5?

A. In banks from ten to twelve feet deep, found there is size varying from two to four feet in diameter, and are known as kettle bottoms.

Q. How do these kettle bottoms compare with the other specimens before you in regard to shape or form?

A. Exhibits of specimens Nos. 1, 2, 3, and 4 are found from two to five feet long, while the kettle bottoms or Exhibit F is found in a round, flat form varying from three to eight inches thick.

Q. Do you find both descriptions of slag in the same cinder piles?

A. Yes, sir; both are thrown away together.

WM. F. BRANNER.

52 JOHN J. VINTON, being duly sworn, doth depose and say in answer to interrogatories proposed to him by the counsel for complainants as follows:

Q. What is your name, age, residence, and occupation?

A. My name is John J. Vinton; my age is fifty-four years old next November; reside at Sharon, Mercer County, Pa.; am by occupation an iron founder.

Q. How long have you been engaged in the iron business, and at what place or places?

A. I have been engaged in the iron business for about forty-two years, at the following places: In South Wales and in the United States; at the following places in the United States, to wit: In Pennsylvania, New York, Ohio, and Kentucky.

Q. Are you familiar with the method of casting iron from blast furnaces, or from cupolas? If yes, for what length of time?

A. Yes. For some forty-two years.

Q. Look at drawing marked Exhibit B and say whether or not that is a correct representation of a sand-mould for casting pig-iron. If yes, describe the parts of the same.

A. Yes, it is. A represents the ground plan of the furnace; B represents the in-trough leading from the furnace; C represents the sand-runner leading to the pig beds; D represents the sow, and E the pigs.

Q. Describe the operation of casting pig-iron in such moulds.

53 A. When everything is ready the furnace is tapped; the metal then runs down through the trough, then into the sand-runner, from there into the last of the series of the sows, from there into the pig bed, until that set is filled; then we shut it off and run the metal into

the second sow, and from there into the second set of pig beds, and so on until the metal ceases to run out of the furnace. Then an iron slab placed between the furnace and the set of pig-beds nearest the furnace, but closer to the pig-beds than the furnace, is driven downward in the sand-runner for the purpose of keeping the cinder from running into the iron in the pig-beds, the notch or hole out of which the iron flows is still kept open, and blast is kept on the furnance, and the material on the hearth is blown out into the trough, in order to clean out the hearth before they stop up the hole or front. This constitutes or makes the heavy slag which is found in the trough after casting.

Q. Are you the patentee of the process of manufacturing iron from the slag or refuse of blast-furnace on which patent this suit is brought?

A. Yes, sir; I am.

Q. State the particulars of your discovery or invention, and the results of your labor in this direction.

A. On the eighteenth day of September, 1873, I went down to the Valley Furnace for to see about some pig-iron for the firm of Wm. McGilvary and Company. I met Mr. Thomas E. Blunt. He and
54 myself sat down on a pile of pig-iron, and talked about pig-iron suitable for the foundry. While there talking, my attention was drawn to some slag that was immediately across the narrow road from where we were. I got off the pig-iron, went about three or four steps, picked up a chunk of this slag, brought it in front of Mr. Blunt, who was still sitting on the pig-iron, and said to him, holding said piece in my hand, "Mr. Blunt, why can't I extract this iron out of this cinder up in our cupola?" (Meaning the cupola of Wm. McGilvary and Co.) Mr. Blunt replied, "I think you can." I said to him, "Will you let me have some of it to try?" He answered, "Yes." I told him that I would send our teamster down after some of it. Mr. Blunt told me to send down the crusher-jam with Mike, and I did so. The teamster brought back a light load of slag. I run it through the cupola the next day. I put on the fuel the same as usual, put on the coke, then some wrought-iron on top of the coke, and on top of this the slag, and limestone on top of the slag, then put on the blast and melted it down, and made a success of it the first trial. Weight of slag, fourteen hundred and sixty pounds, which produced eleven hundred and twelve pounds of pig-iron. My next trial was the following day, with the following result: Forty-two hundred pounds of slag, twenty-six bushels of coke, which produced thirty hundred and thirty pounds of iron. This satisfied me of the value of the discovery. I then went to Washington, D.
55 C., and procured my patent.

Q. Why did you use wrought-iron or scrap in these first experiments?

A. To create a more intense heat in the cupola.

Q. Have you tried it without the scrap; and if so, with what result?

A. Yes, I have; and I find it cheaper to do without than with, but it is a slower process. It burns out my cupola sooner with scrap-iron than without it.

Q. If it were an object to make this iron quickly, would you still use this scrap?

A. I would; yet I think the iron is a little better when made with scrap, for some purposes. It is substantially the same process, whether the scrap is used or not.

Q. Look at specimens, Exhibits A, C, D, E, F, and G and H, the latter two now being offered in evidence, and say if they show material

similar to that with which you experimented with before you obtained your patent.

A. Yes, sir; they do.

(Witness here produces Exhibits I, K, which are offered in evidence.)

Q. What do these Exhibits I and K show?

A. Pig-iron made from slag by my process.

(Witness also produces Exhibit "L," which is offered in evidence.)

Q. What does this Exhibit "L" illustrate?

A. Cinder, which runs through the notch below the tweers in my process of reducing iron from slag.

Q. Are you acquainted with the firm of Homer Hamilton & Co., defendants in this suit?

56 A. I am acquainted with Mr. Hamilton, Mr. Tod, and Mr. Gerwig; became acquainted with them at Youngstown, Ohio, at their new works.

Q. When did you visit them at their works?

A. In the month of December, 1873.

Q. State what occurred at that interview.

A. I asked Mr. Tod when they commenced melting slag in their foundry. He answered that he could not exactly tell, but that Mr. Gerwig could tell; he then asked Mr. Gerwig, "When was it we commenced melting this slag?" Mr. Gerwig answered, "The last of October, 1873."

Q. While there at this time, did you see any of this description of slag (now before you) in their possession?

A. I did.

Q. Did you see them make any use of it; if so, what were they doing with it?

A. I saw the men throwing it right into the cupola, also saw them running the iron into the pig beds, and I then notified them that they were infringing on my patent. This was in December, 1873.

Q. How much of this material or slag has been collected by the Vinton Slag Company since the date of the patent?

A. About two thousand three or four hundred tons.

Witness here offers in evidence a sworn statement made by the bookkeeper of the Vinton Slag Company, taken from the books of original entry of that firm, which shows the amount of slag received by them, by whom delivered, and from where received, same being marked Exhibit M and hereto annexed.

JOHN J. VINTON.

57 All the witnesses produced by complainants having been examined, and the hour of adjournment having arrived without the appearance of Thomas W. Sanderson, solicitor for defendants, the direct testimony on the part of the complainants was here closed, having no more testimony to offer in chief.

JOSEPH N. McCLURE,
Notary Public.

Filed opin. September 10th, 1875.

58 *Defendants' testimony.*

In the circuit court of the United States, northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER, HAMILTON AND CO.

Deposition of William McFarland, of Trenton, New Jersey, a witness called on the part of the defendants, and taken by and before me, by agreement of counsel, on this 16th day of April, A. D. 1875, at the office of Robert S. Woodruff, jr., in the city of Trenton, Mercer Co., New Jersey.

WILLIAM MCFARLAND, of lawful age, being first duly sworn, as hereinafter certified, testifies as follows:

1st Q. (by defendants' sol'). State your full name, your age, and present place of residence.

A. William McFarland; aged 53 years this spring; Trenton, Mercer County, New Jersey.

2nd Q. State your present occupation and business, and also state in what business you have been engaged during the past twenty years, and where.

A. I am an iron-founder by occupation, but am in no business at present. During the past twenty years I have worked at the foundry and machine business, and also at farming, at St. Louis, Philadelphia, Cleveland, and Trenton. I worked at farming in the suberbs of Philadelphia.

59 3. Q. State what you did at any time, if anything, as to constructing, either by yourself or with some other person or persons, a cupola, or small furnace, or construction of any kind, in order to melt the trough runners, or slag, or refuse of blast furnaces, in order to make pig-iron or castings from the same. State fully, giving in your answer the place and the time, as nearly as you can.

A. In 1858 I procured a patent for a furnace, and put up one in St. Louis, Mo., in Hitchcock & Co.'s foundry. It was for the purpose of melting iron, and at that time I melted Iron Mountain ore in it for an experiment, and the result was that it was no detriment whatever to the furnace. It was not constructed for melting through runners, or slags, or refuse of blast furnaces; but I think my claim covered the melting of ore, at least such was my intention. We did not make pig-iron, but castings from said furnace. I put up this furnace in 1857 or 1858, as near as I can remember. When I say I put a furnace up, I mean that I applied my improvement to a furnace.

4. Q. If you answer the 3rd question, that you did construct a cupola, or small furnace, for the purpose therein specified, please state what led you to do so; what you knew as to the existence of metal'ic iron in the trough runners, or slag of blast furnaces, and how you ascer-
60 tained that fact, and state all knowledge you had previously upon that subject, and how derived.

A. That furnace was constructed for melting iron for castings, and I melted ore in it, but did not melt slag or other refuse of blast furnaces in it, for any purpose.

5. Q. If you answer the 3rd question, that you did construct such cupola, or furnace, or knew of the same, state exactly where the same was located, and state also by whom the same was owned, and by whom

operated, and how long the same was operated, and what was made at it, pig-iron or castings, or both. State fully.

A. At St. Louis, Mo. It was owned by Hitchcock and Company. I operated it for about eighteen months, until the partnership expired. Castings only were made at it.

6. Q. State exactly how the cupola or furnace was operated; that is, state—

1st. The kind of blast, hot or cold.

2nd. The kind of fuel used in it.

3rd. What was used as fluxing material.

4th. How the material was charged, and as nearly as you can, state in what proportion.

5th. How you prepared the materials, if in any way, before charging them.

A. (1.) It was a cold blast that was used.

(2.) I used coke or anthracite coal, or both, as fuel.

(3.) Sometimes limestone was used, or oyster shells; never
61 used much of either as fluxing material. When clean iron is used no flux is required.

(4.) After the bed is made and the first charge is put on, we use one pound of coal to ten of iron; the coal is put first and then the iron, and so on alternately; one to ten is the proportion of the charge.

(5.) We break the pig-iron in three or four pieces before putting it into the furnace. If the coal is in too large pieces, we break it also.

7. Q. State what effort was made, if any, or what appliances or means were used, if any, to prevent others from seeing and knowing what was done at the cupola or furnace you have mentioned, and just how it was done.

A. I had a patent on the furnace, and I supposed that secured me, and I did not keep the working secret.

8. Q. State about how many persons you are able to name who did know all about the matter.

A. All persons connected with the works and my friends, who I invited, knew of this patent furnace, and on the occasion of my melting the ore in this furnace, I put an advertisement in one of the St. Louis daily newspapers, inviting any one interested in seeing the ore melted in a cupola furnace to attend.

9th q. State whether you know Robert Paisley, now of Beaver Falls, Beaver County, Pennsylvania; and if you say you do, state whether or not you informed him at one time as to melting runners and slag, as you have above explained; and if you did, state as nearly as you
62 can remember when and where you told him.

A. I do know Robert Paisley aforesaid; he is an old friend; he knew all about my patent furnace, at least I told him all about it, but I cannot remember any particular time when I did tell him.

10. Q. Please state also the names and residences of any other person or persons to whom you told the same things in substance.

A. I told all my acquaintences about my patent furnace, the same as I told Robert Paisle.

11th q. Please state all you may know as to any other person, persons, or corporation having at any time prior to the time you speak of, as having built the cupola or furnace for the aforesaid purpose, in any way used furnace trough runners or furnace slag in order to melt the same to make pig-iron or castings, or both, at any place or in any manner.

A. I never heard of any one so using a cupola furnace for that purpose.

12th q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this case or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and and at large in your answer.

63 A. In 1860, I permitted E. W. Shippen, of West Philadelphia, to apply my patent to his cupola furnace, for the purpose of experimenting in melting iron ore, and he melted ore several times in that furnace, without any detriment to it. In 1864, at Hopewell, Chester County, Pennsylvania, I constructed my patent furnace and operated it for the purpose of getting the iron out of the slag and cinders of a cold blast charcoal furnace. Some of the slag I melted for the purpose of getting the iron out of it, the largest portion I ground out in a tumbler or mill. The portion I melted was the richest, and the reason I did not melt more was because I thought it was more economical to grind it out. I worked at this about six months and gave it up, because I discovered that the iron in the cinder heap had been destroyed by the charcoal in the heaps being on fire sometime previous; my object was to make pig-iron.

Cross-examination by A. McCALLUM, solicitor for complainants:

X Q. What was iron worth at the time you speak of, when you made the trial at Hopewell?

A. When we commenced, it was worth fifty dollars a ton, and when we ended, it was worth ninety dollars.

64 X Q. Did you ever try to get iron from cinder at anytime subsequently by melting in a cupola furnace?

A. No; Because all the cinder heaps I saw at the charcoal furnaces were burned in the same way as the one at Hopewell.

X Q. Can you give the number and date of your patent?

A. The date I think is December, A. D. 1858. I do not remember the number.

X Q. Did you ever construct a cupola furnace of the ordinary kind, that is to say, without your patent improvement?

A. Yes, sir.

X Q. Did you ever try to melt the cinder or slag or refuse of blast furnaces in an ordinary cupola furnace?

A. No, sir; we always try to get rid of the slag in a cupola furnace, as the melting of slag would destroy its efficacy for melting iron.

X Q. What was the result of the experiments you have described with regard to the melting of ore in your patent furnace? Did you produce pig-iron or castings?

A. No, sir; I merely melted it without injuring the furnace.

X Q. What did you do with the furnace you built at Hopewell after you abandoned the experiment or trial?

65 A. I removed it to Philadelphia and sold it to different parties; the shell to one, and the bed-plate to others. I do not know where any part of it is now.

WILLIAM McFARLAND.

Filed April 20, '75.

In the circuit court U. S., northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON & CO.

The plaintiffs will take notice that on Friday, the 12th day of March, A. D. 1875, the above-named defendants will take the depositions of sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of Messrs. McClure and Mason, in the borough of Sharon, county of Mercer and State of Pennsylvania, between the hours of 9 o'clock a. m. and 6 o'clock p. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

March 1st, 1875.

THOS. W. SANDERSON,
Att'y for Def'ts.

To A. MCCALLUM, Esq., *Sol' for Comp'ts.*

I have notice this 3rd day of March, 1875.

A. MCCALLUM,
Sol. for Plaintiffs.

66 Deposition of a witness, taken by and before me in a cause now pending in the circuit court of the United States in and for the northern district of Ohio, wherein John J. Vinton et als. are complainants, and Homer Hamilton & Co. are defendants. Taken at the borough of Sharon, Mercer County, Pennsylvania, by agreement with notice. Present on part of complainants, A. McCallum, esq.; on part of defendants, Thomas W. Sanderson, esq.

JOHN ENWRIGHT, a witness called on the part of the defendants, of lawful age, being by me first duly sworn, as hereafter certified, testified as follows:

Q. 1. State your name, age, and place of residence.

A. John Enwright; am going on 37; reside in Sharon, Mercer County, Pennsylvania.

Q. State what is your business or occupation, and how long has it been such.

A. A moulder; about 22 years.

Q. State how long you have worked at that occupation in the United States.

A. Five years in June next.

Q. State what you did, if anything, as to building a cupola near this place at any time for the purpose of melting furnace runners into pig-iron.

A. I built a cupola for that purpose three years ago, next July; can't say exactly.

Q. Where did you build it?

67 A. About half a mile north of this town, near the river, on the Orangeville road.

Q. State whether or not you had any foundry connected with the cupola.

A. I had nothing there except a shed to make pig-iron in.

Q. For what purpose did you build this cupola?

A. To melt the slag and refuse from the blast furnaces.

12th q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this case or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and and at large in your answer.

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X Q. What did you do with the furnace you built at Hopewell after you abandoned the experiment or trial?

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Filed April 20, '75.

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A. MCCALLUM,
Sol. for Plaintiffs.

66 Deposition of a witness, taken by and before me in a cause now pending in the circuit court of the United States in and for the northern district of Ohio, wherein John J. Vinton et als. are complainants, and Homer Hamilton & Co. are defendants. Taken at the borough of Sharon, Mercer County, Pennsylvania, by agreement with notice. Present on part of complainants, A. McCallum, esq.; on part of defendants, Thomas W. Sanderson, esq.

JOHN ENWRIGHT, a witness called on the part of the defendants, of lawful age, being by me first duly sworn, as hereafter certified, testified as follows:

Q. 1. State your name, age, and place of residence.

A. John Enwright; am going on 37; reside in Sharon, Mercer County, Pennsylvania.

Q. State what is your business or occupation, and how long has it been such.

A. A moulder; about 22 years.

Q. State how long you have worked at that occupation in the United States.

A. Five years in June next.

Q. State what you did, if anything, as to building a cupola near this place at any time for the purpose of melting furnace runners into pig-iron.

A. I built a cupola for that purpose three years ago, next July; can't say exactly.

Q. Where did you build it?

67 A. About half a mile north of this town, near the river, on the Orangeville road.

Q. State whether or not you had any foundry connected with the cupola.

A. I had nothing there except a shed to make pig-iron in.

Q. For what purpose did you build this cupola?

A. To melt the slag and refuse from the blast furnaces.

A. Some 14 or 15 years ago, in the old country, I took an old tea-kettle and lined it with sand, and melted part of an old pot; used coke or charcoal and a hand-bellows.

72 Q. About how long were you building your cupola near this place you speak of?

A. From twelve to eighteen months.

Q. Could it be seen from the road; and how near to the road was it?

A. It could be seen from the road; it is in the forks of the road. Could be seen from the roads; not twenty yards from either road.

Q. Do you know where Mr. Vinton lived while you were building the cupola?

A. I don't know where he lived exactly; he was foreman of McGivery's foundry; I don't know whether he was there all the time I was building; but he was there while I knew him.

Q. State whether or not you have had any conversation with Mr. Vinton about that cupola since he was there.

A. He had a patent out on it a long time before I knew about it; and I was told about it by a man I wanted to go into partnership with me. I went to the foundry and told John Vinton he had intruded on my principles of melting these runners; he said he did not. I told him it was my idea, and he said it was not, it was his own, and he said he never noticed it until some time before he got the patent out for it; he told the time, but I can't remember it. I told him that it was my idea, and I would see further about it. He said it was his patent, and

73 I could get my own. He said he had to swear he had never seen it melted to get his patent.

Q. Did ever you see these runners melted at blast furnaces?

A. Not knowingly.

Q. State whether your cupola is still standing or not.

A. It is standing there as it was three years ago, excepting that the horse power is taken away not quite three years ago.

Cross-examination:

Q. How long have you been in this country?

A. It will be five years in June.

Q. Where did you come from?

A. From England—Newport, Monmothshire.

Q. What was your business there?

A. A moulder.

Q. Was there any blast-furnaces for making iron there?

A. Not in the town; but 12 or 18 and 20 miles around there was lots of them.

Q. Where have you been employed in this country? Give places.

A. In Smith's Foundry in Pittsburg, and in Sharon here.

Q. When did you come to Sharon, and in whose employment have you been since you came?

A. I came here four years ago last January, and have been in the employ of the Westerman Iron Company since I came; a moulder at the furnace.

74 Q. What average compensation did you receive for your services during that period?

(Objected to by counsel for defendants as not being cross-examination.)

A. About $2 per day.

Q. Upon whose land is this cupola which you say you have built?

A. It is on a piece of ground that I bought, made a payment on of $50.00 and did not complete the payments.

Q. When did you buy it?
A. Four years ago next July.
Q. When did you commence to build the cupola?
A. In the summer following.
Q. Did you ever finish it?
A. I never had it in working order.
Q. Did you ever have a fire in it?
A. I built a fire to dry it.
Q. Did you ever melt any iron in it?
A. Not in the cupola.
Q. When did you abandon it?
A. I never abandoned it.
Q. When was it that you had it so far completed as to dry it up as you say?
A. Two years ago last fall.
Q. Have you done anything to it since?
A. I have not; my health has been so bad.
Q. Where did you melt this portion of the runners in the stove-pipe you speak of?
A. In the shed up where the cupola is.
Q. How much did you melt?
75 A. I can't say how much, a couple of pounds more or less, and I only melted it for pastime.
Q. Did you separate the iron from the slag?
A. No; I left it as it was, and threw it away. I had had all of it I wanted.
Q. You say you told some parties, to wit, Luke Ryan, Chas. McCarthy, and Thomas Barry, that you were going to make iron from this slag. When did you tell them this?
A. I told first Luke Ryan, this time four years ago, Chas. McCarthy and Thomas Barry twelve months afterwards.
Q. Did you ever make any other trial than the one you speak of in the stove-pipe?
A. No; not any.
Q. When you made that trial did you see any limestone or fluxing material?
A. Not any.
Q. Did you ever ask permission or any foundryman to let you make a trial in any foundry cupola?
A. No; because I was convinced that the iron was in it, and all it wanted was melting.
Q. Did you ever run or work about the cupola furnace of a foundry, or have anything to do with the operation of melting iron in a foundry cupola?
A. Yes; but not in this country.
Q. Did you every make any practicable experiment in melting
76 iron besides those you have spoken of; that is, the pot and kettle experiment, and the stove-pipe experiment?
A. Yes; I have melted it in crucibles.
Q. What amount or degree of heat does it require to melt iron?
A. I can't tell.
Q. Have you ever conversed with Mr. Vinton about this slag, except at the time you state that you talked with him about his patent?
A. No.
Q. Have you ever made metallic iron from this slag, or furnace-runners, other than the experiment with the stove-pipe?

A. No.

Q. You have stated that the cupola you were building was situated at the forks of the road. Is there any run or creek between it and the road?

A. There is a little drain where the water runs down from the spring above.

Q. How close does it run to the shed or building you put up?

A. Close alongside it.

Q. Is there pretty steep hills arising around back of the place where this run comes from?

A. Yes, there is, all around it.

Q. Did you find it necessary to build a wall to protect the erection from the water when it floods?

A. No; I did not.

77 Q. Did you not build a wall, or portions of a wall, about the cupola you were building?

A. There was a bit of a wall under it to keep it dry from the ground.

Q. Did you not use some of the material you say you collected for building this wall?

A. No slag. I built in old bricks I collected for that purpose, but no slag.

Q. Do you state positively that you did not use any of this slag material for the purpose of building the foundation, or wall, or embankment, or for other purposes than the construction of your cupola and its surroundings?

A. Not any that I know of.

Q. You have stated that Mr. Vinton and another gentleman, a Mr. Runsel, came to this place and had a conversation with you. What time of the year was this, as nearly as you can tell?

A. Some time in July, as nearly as I can tell.

Q. What year?

A. Twelve months last July.

Q. Did you tell either Mr. Vinton or Mr. Runsel, at that time, that you were going to make iron from the slag?

A. No.

Q. You say you had a talk with Mr. Vinton about making nails. Did you not tell him then, or Mr. Runsel, who was with him, that you were going to make nails there?

A. No; I did not. I told them I had a place in the old country where I made nails.

78 Q. Did you not tell one or the other of these gentlemen that you were going to make images there?

A. I did not tell them what I was going to do. I told them I was going to do something, but I did not tell them what. I did not tell them I was going to make images.

Q. Did you ever tell any one that you had made iron from slag in the old country before you came to this country?

A. No; I did not tell them that I had made iron from slag in the old country.

Q. What did you tell any one on this subject?

A. I told them that I was told it was done there. It was a long time after I started here I was told that.

Q. Did you ever tell any one that you had a patent for making iron from slag in the old country?

A. No.

Q. When was it that you first spoke to Mr. Vinton about making iron from this slag?

A. About twelve months ago, in the spring of 1874.

Q. You say that upon that occasion that you told him that you would see farther about it. What did you do in this matter? What did you mean by that expression?

A. I meant that if he had a patent I had a right to a share of it, and I would see if I could not make a claim on it.

Q. What, if anything, did you do in the matter?

79 A. All I did I went to Cleveland and saw an attorney, and he told me that if it was my invention I could claim a patent on it. I had no money to carry it up, and wanted him to carry it up and take a share of it. He would not do it.

Q. Did you see Homer Hamilton, or any one in Youngstown, about it?

A. Yes; I saw Homer Hamilton and Mr. Harris here.

Q. When was this?

A. Last August or September, I believe.

Q. Was this before or after you went to Cleveland?

A. Before I went to Cleveland.

Q. What did Mr. Fred. Harris or Mr. Hamilton say to you at that time?

(Objected to by counsel for defendants as not being cross-examination, and as being immaterial, and declarations of Harris being inadmissible.)

A. I wanted them to help me get the patent. They said they would not help me get the patent. If I applied and got it they would give me the royalty.

Q. Who paid your expenses to Cleveland?

A. I went on my own expense.

Q. Did they tell you they had melted this iron or slag called runners before you had done it?

A. No; but before Vinton.

Q. Did you tell them what you had done in the matter?

80 A. Mr. Harris took my ideas one time he came across here previous to that.

Q. How long previous?

A. I can't say; somewhere about a month or so.

Q. How much royalty did they promise to pay you if you got the patent?

(Objected to by counsel for defendant.)

A. They did not promise me anything. They left it to me if I got the patent.

JOHN ENWRIGHT.

Filed June 2, '75.

Depositions of witnesses taken by and before me in a cause now pending in the circuit court of the United States in and for the northern district of Ohio, wherein John J. Vinton et al. are complainants, and Homer Hamilton and Co. are defendants. Taken at Beaver Falls, Beaver County, Pennsylvania, by agreement without notice. Present on part of complainants, A. McCallum, esq.; on part of defendants, Thos. W. Sanderson.

ROBERT PAISLEY, of lawful age, being first duly sworn, testifies as follows:

Question (by Sanderson, for def't). State your name, age, and place of residence.

A. Robert Paisley; about 50; reside at Beaver Falls, Pennsylvania.

Q. State what is your present occupation.

81 A. Am superintendent and treasurer of the Beaver Falls Corporation Foundry Association.

Q. How long have you been such?

A. I have been treasurer since June, 1872, and superintendant since October, 1872, I think.

Q. State how long you have been connected with the concern in any way.

A. I think it was in Feb., 1872, that I subscribed stock for it. I came there in April, 1872.

Q. State whether or not since that time you have been in any way connected with the operations or work in the foundry.

A. I have all the time.

Q. State what you know, if anything, as to the melting and use of furnace-runners or slag at the foundry you have named.

A. I know they have been run there. They got some there at one time to try them and see what the percentage would be of them.

Q. State as nearly as you can when that was.

A. Somewhere about April, 1872.

Q. State as nearly as you can about what quantity was procured and used at that time.

A. Somewhere about 900 pounds.

Q. State how they were used and what was made from them.

A. I believe they run them by themselves, and run them into it, sand, not in regular pigs, but into chunks.

Q. State what, if anything, was done after that at your foundry in procuring and melting these runners.

82 A. They were got by the car-load after that and mixed with the other iron and run into stove-plates.

Q. State whether or not any of them were melted and run into pig-iron.

A. Yes, there were.

Q. State as nearly as you can the time you began to get them by the car-load and use them.

A. It was in August, 1872.

Q. Please explain a little more fully just how you used them as to making castings and pig-iron.

A. They were put in by themselves to make pig-iron. Making castings they were charged with pig-iron.

Q. When you made pig-iron, state how you charged the cupola; that is, what did you put in it with the runners?

A. The cupola is heated up in the first place before you charge at all. Next you put in coke, then a little limestone, then the runners, so on alternately.

Q. State whether at any time you charged the cupola in the first instance in order to make pig-iron out of these runners.

A. We did.

Q. When you are making pig-iron alone in the cupola, state whether or not you put in coke and the other material before or after you fired the cupola and put on the blast.

83 A. The cupola is always lit up first, we put in wood and then coke so as to make it light up quick.

Q. About what time did you commence to make pig-iron at your foundry after the time you mentioned in April, 1872?

A. I could not tell the exact time, it was a time when the men were not at work; the summer or fall of 1872; in hot weather.

Q. About how much did you make of pig-iron previous to January 1st, 1873?

A. I can't say; several tons, perhaps 3 or 4 tons.

Q. State whether or not you manufactured any runners into pig-iron between January 1st and Oct. 1st, 1873.

A. No, sir; we did not. We always run it in with the other iron during that time.

Q. State your best judgment as to about the number of tons of pig-iron you made from these runners at your cupola all together before October 1st, 1873.

A. I have stated that as nearly as I could; we only made it into pig-iron once; some three or four tons, more or less.

Q. In that do you include the iron you made in April from the runners?

A. No, sir.

Q. State who was superintendant of the cupola in April, 1872.

A. Mr. J. C. Sennatt, I think he signs his name.

Q. Who was superintendant in the summer and fall of 1872?

84 A. I think he was. I went in when he went away. He went away in the fall of 1872.

Q. State whether or not you were present at the time the pig-iron was made in August or September, 1872.

A. No, I was not present.

Q. State whether you were present when the iron was made in April, 1872, from runners.

A. I was there and saw them carrying it out.

Q. State whether or not you have been present and saw these runners melted in the cupola with pig-iron.

A. Yes, I have. I have charged them in myself many a time.

Q. State whether you did so during the year 1872.

A. I think not.

Q. State when was the first time you did so, as near as you can recollect.

A. I could not tell exactly, I am sure.

Q. State whether you ever did so to your recollection prior to October 1st, 1873.

A. Oh, yes; before that.

Q. State whether or not you broke up the runners before charging them into the cupola.

A. Yes, sir.

Q. State about how many men you had employed about that foundry in April, 1872, and up to January 1st, 1873.

A. Twenty; more or less.

Q. State about how many of these men assisted in charging

85 the cupola and in and about the casting.

A. One man done the charging generally. There would be ten or twelve moulders who done the casting.

Q. At the time you made the iron from the runners, in April, 1872, about how many of the men were present and saw what was being done?

A. The most of the moulders were there, and assisted in carrying the iron out; it was the last of the heat; all the other iron was run out, and we put in more coke to make a hot fire and melt them. There were 8 or 10 men present.

Q. State whether or not there was any talk among those present about melting these runners.

A. There was not much talk about it; there were very few knew about it.

Q. Who were those few who did know about it?

A. Mr. Lennett, myself, William H. Paisley, a son of mine. The most of the moulders I suppose knew it; they were all stockholders. But we did not want outsiders to know it; that is, the public; if it was a good we wanted to keep it to ourselves.

Q. Where did you procure the runners you have melted at your cupola?

A. At Struther's iron furnace, most of it, I believe. We got some at Lowell Furnace, that is, from some of the men, which they got for getting it out.

86 Q. About how many tons altogether have you *have you* used prior to October 1st, 1873?

A. 58 or 60 tons anyway.

Q. Where did you place it after it was shipped to you?

A. Piled it up in the yard.

Q. What means did you use, if any, to keep persons out of your foundry when you were melting runners?

A. None; we didn't prevent any persons from coming in, but of course nothing was said to them.

Q. State what kind of a cupola it is that you use at your foundry.

A. The cupola we had at that time we have not got now. We had Truesdale's patent cupola.

Q. State how your company was organized—that is, whether each workman was a stockholder.

A. I believe all the workmen at that time were stockholders.

Q. Where is Mr. Lennette now; where does he live?

A. Cincinnati I believe is where he is now.

Cross-examination:

X Q. How long have you been in the foundry business?

A. Went to learn the trade in 1835.

Q. Are you familiar with the construction of the ordinary foundry cupola?

A. Yes, I think so; I have built them up many a time.

87 Q. When did you quit using this Truesdale cupola you speak of?

A. Last Christmas.

Q. Described how it was constructed.

A. It was just like an ordinary pipe with a drum around it where the blast goes in. There where the blast goes into the cupola there was 13 stones for distributing the blast. The charging hole was the same as the other cupolas. The tapping hole was just the same too. Then we had what we call the slag hole, for the slag to run from. That is about the secret of the concern. You can't run successfully unless you have that.

Q. Did you ever see an ordinary cupola with more than one tapping hole?

A. Yes.

Q. State where and when.

A. We have got one now for the same purpose of running this slag or runners; this is the only one I ever saw, except the one we had before, and that was an ordinary cupola except the stones.

Q. When was the cupola you now have built?

A. This last winter, 1874–'75.
Q. Did it have this cinder hole you speak of when it was built?
A. Yes, sir; it was in it before it went up.
Q. It is in it now?
A. Yes, sir.
Q. Did the old one you had have the cinder hole also?
88 A. Not when it was put up, but it had it afterwards.
Q. When was it put in?
A. When we commenced to use the runners it was put in for that purpose.
Q. When was that?
A. In 1872.
Q. What time in 1872?
A. When we used the first runners up here, in April, 1872.
Q. State, if you can, what day in April it was that you say you first commenced to melt these runners.
A. Indeed I could not tell you that. I was there and saw it done, but I cannot tell the day.
Q. When you are melting pig-iron for castings, do you use the two holes you speak of; that is, the cinder hole and the tapping hole?
A. No, sir; we use the tapping hole, but not the cinder hole.
Q. Did you ever see or hear of a foundry cupola which had two holes when used for melting pig-iron for castings?
A. No, sir; I believe I did not. I have seen a good many.
Q. How much iron did you make from the runners in April, 1872?
A. Indeed I could not tell you that. I understood they had 700 lbs. of iron from 900 of runners.
Q. Was it weighed?
89 A. I believe it was; yes, sir, I believe it was weighed.
Q. Do you have a record of it on the books?
A. No, sir.
Q. Did you think that was a good thing?
A. Yes, if it had all been like that; that yielded 75 per cent. and over.
Q. Is that why you wanted to keep this thing from the public?
A. Yes, of course.
Q. Describe this material you call runners—its appearance.
A. Little iron in chunks, as far as I know, there is iron and white, what are called limestone and dirt mixed in it. I don't know but very little more about it.
Q. Did you tell any outsider of the result of your experiment?
A. I believe not, as far as I know; we *to* wanted to keep it quiet; we wanted to make something out of it ourselves; we were the first that used it in this section that I know of.
Q. Have you any of this material on hand now?
A. We have a little, I believe.
Q. How much?
A. Not quite a car-load, I guess.
X Q. How long have you had it?
A. Well, not very long; it was before the first of the year we got it.
Q. Between April and August, 1872, did you procure any of
90 this material from any source?
A. Indeed, I don't know; I hadn't the ordering of it then.
Q. You say in your direct examination that you obtained 900 pounds of it about April, 1872, and again that you commenced to get it by the

car-load in August, 1872; did you get any in the interval between April and August, 1872?

A. I don't know; I was not the one that ordered at that time.

Q. When did Mr. Lennett leave?

A. I think it was in October, 1872; I am not sure.

Q. How much did you have on hand when you took charge?

X A. I couldn't tell you that either, there might be a car-load and not so much.

(Witness states that Mr. Lennett's initials are A. J., instead of J. C. as he stated before.)

Q. You say in your direct examination that you did not make any pig-iron between January 1st and October 1st, 1873; did you make any iron of this runner material during that period?

A. Not that I remember of.

Q. When was the 3 or 4 tons of pig-metal made that you speak of?

A. Indeed, I couldn't tell you the exact day. It was in the year 1872.

Q. Can you state the month?

91 A. No; but it was made before Mr. Lennett went away.

Q. Did you see it made?

A. No, sir.

Q. Have you ever used any of this material at any time for making castings?

A. Of course it was all used in that way, for making castings; it was mixed with other iron, even what was made into pig was melted over again to make into castings.

Q. By castings do you mean stove-plates?

A. Yes, sir.

Q. What proportion of slag do you use in the cupola with the pig-iron for the purpose of making castings?

A. The quantity would depend upon the quality of the slag.

Q. What is the highest quantity you have used?

A. I suppose they have used as high 200 to 300 to a charge of 700.

Q. Do you know?

A. I couldn't say; I don't know; I aint positive. I have used myself from 150 to 200 to the charge.

Q. What is the least you have used?

A. I guess that is about the least I have ever used.

Q. Do you still use it making stove-plates?

A. Yes, we generally do; we have not been using it lately on account of having some other cheap iron.

92 Q. How much iron in any form have you made from these runners? State as near as you can.

A. I couldn't even approximate to the right amount. It would be so indefinite I could not come near it.

Q. Did you ever sell any pig-iron made from this material?

A. No, sir.

Re-examination:

Q. Did you know a Mr. Wm. McFarland, who built a foundry in this valley?

(Objected to by counsel for complainants.)

A. No, sir; there was no McFarland that I know built a foundry in this valley.

Q. State what you heard, if anything, concerning this man McFarland having melted t'ough-runners in a foundry.

(Objected to by counsel for complainants.)

Q. I know a man by that name and he told me about it, that is, about melting these runners, that he put up a cupola expressly for it at the blast-furnace.

Q. When did he tell you this?

A. A good while before the war it should have happened, I was working in Philadelphia at the time. It was at Philadelphia he told me.

Q. Please state now all he told you about it.

(Objected to by counsel for complainant.)

93 A. He did not give me the particulars. I told that he told me that he put up a cupola at the blast-furnace to melt the runners.

Q. What did he tell you if anything as to what he made out of the runners?

(Objected to by counsel for complainants.)

A. He did not tell me.

Q. Did you learn from him where the furnace was located?

A. I did, but I don't know now.

Q. State whether or not in April, 1872, at the time you made iron from runners, or at the other time when 3 or 4 tons of pig-iron were made, there were any men there from the other foundry in this place?

A. I do not know whether there were or not.

Q. At any other time you were using runners in your cupola state whether the men from the other foundry were there.

A. I have saw men that worked there looking at the slag running out, and have seen the foreman of the other foundry looking at it—it was a matter of curiosity to see the slag running out.

ROBERT PAISLEY.

Also at the same time and place WILLIAM J. SHANER, a witness called on the part of the defendants, and by me duly sworn as hereinafter as certified, testified as follows:

94 Q. What is your age and where do you live?

A. Twenty-four years of age; live in Beaver Falls.

Q. State what is your occupation.

A. Smelter at a foundry cupola.

Q. State whether or not you were working for the Beaver Falls Corporative Stove Company in April, 1872.

A. I was working for them in the spring of 1872, and have been working there ever since.

Q. What did you work at during that time?

A. Smelting.

Q. What did that require you to do?

A. To get up the iron stock and melt it.

Q. State whether or not it was your duty to charge the cupola, or superintend the charging of it.

A. It was my duty to charge it.

Q. State what you know, if anything about some furnace tough runners being melted there in the spring of 1872, and whether you were present at the time and charged the cupola or saw it done.

A. In 1872 Mr. A. J. Lennett brought some of this slag down here to see what he could do with it. They sent about 900 of it in one of the cars of pig-iron, and I took it up and charged it myself.

Q. What did you make out of it after it was melted?

A. Run it into pig-iron.

Q. Tell us how you put it into the cupola, and what with.

95 A. First I started my fire, put in coke enough for a bed, and then sprinkled a little limestone on the bed, then put 500 of this

slag the first charge. Then I put on more coke, and put on 400 more and added more limestone.

Q. Did you put anything else in at that time in April when you melted the slag?

A. No, sir; not that day, we were experimenting.

Q. State what you know, if anything, about making any pig-iron at that foundry after that time from these runners or slag.

A. There was two heats after that. The first day we melted 2,800 of runners, the second day 6,500 of runners.

Q. What did you make of them?

A. Pig-iron.

Q. Did you mix anything with the runners in the cupola at those times?

A. No, sir.

Q. State when this was, as nearly as you can.

A. I can't just tell what month. I think it was in June of 1872.

Q. State whether or not you used runners after that to make castings of.

A. We did, mixing them with other iron.

Q. State your best impression of the quantity of runners you used at that foundry from the time you commenced up to October 1st, 1873.

A. I could not estimate it.

Q. State as nearly as you can how many men were present belonging to your works when you melted the runners in April.

96 A. I suppose there was about 12 or 16 present that day.

Q. How many at the time you melted them in June?

A. Eight or ten, I think.

Q. State whether or not the men present on these occasions knew that the runners were being melted and being made into pig-iron.

A. They did.

Q. State whether or not you saw on either of these occasions any persons present that did not belong to your works.

A. I did not.

Q. State whether or not you saw other persons present at any time you were melting these runners with pig-iron to make castings.

A. I did see other persons present.

Q. Where did they belong?

A. Belonged to Beaver Falls here.

Q. State what difficulty there was in April, 1872, and in June, 1872, when you melted these runners into pig-iron for any person who had been there to have seen and known what was being done.

A. No difficulty as I remember.

Q. Did you have a cinder hole in your cupola at the time last refer'ed to April and June, 1872?

A. We had in June, did not have in April.

Q. When you used pig-iron and runners together, did you use the cinder hole?

A. Yes, sir.

97 Q. State whether or not you used any runners between the time you melted them in April and the time in June, 1872, with pig-iron to make castings.

A. I don't remember.

Q. State whether or not you did after that time, and about how frequently.

A. We did after that time. I use two hundred of runners to 500 of charge every day.

Cross-examination:

Q. You say you used 200 of runners to 500 of charge. Do you mean to say that you used 200 pounds of slag and 500 pounds of iron to make up the charge?

A. Yes, sir.

Q. Did you make stove-plates of this material in this quantity?

A. Yes, sir.

Q. Are you a member of the association?

A. I am.

Q. Were you at that time?

A. Yes, sir.

Q. Did you tell any outsider about this experiment?

A. Not at the time of it.

Q. Why did you not make it known?

A. We did not want everybody to know it.

Q. You say in your direct examination that there was no strangers present at either of the times when you made pig-iron from these runners, and again you say that you saw persons belonging to Beaver
98 Falls present when you were making castings. Was this after the time you speak of, and who were the persons you refer'ed to?

A. It was after the time we experimented that the persons were there. I can't just remember who they were.

Q. You said in your direct examination that there was no cinder hole in the cupola when the first experiment was made; was the cinder hole you refer to as subsequently made in the new or old cupola?

A. It was in both; at the time we experimented there was none.

Q. When was it made?

A. Shortly afterwards.

Q. What part of the cupola was it in?

A. The back part.

Q. Above or below the tuyeres?

A. Below.

X Q. How do you fix the date when you made the second experiment, casting pig-iron, as in June, 1872?

A. I can't just give the correct date. June is as near as I can come to it.

Q. You say you cannot estimate the quantity of runners or slag that you have used. Can you not say about how much?

A. No; I cannot.

Q. Do you know, or have you any means of knowing, how much iron in any form you have made from them?

99 A. No; not more than at the time of the experiment.

Re-examination:

Q. You say in your cross-examination that you did not tell others about making pig-iron from runners, at the time you made the experiment. State whether or not you did afterwards.

A. I did not.

WM. J. SHANER.

Filed June 2, 1875.

Depositions of witnesses taken by and before me in a cause now pending in the circuit court of the United States in and for the northern district of Ohio, wherein John J. Vinton et al. are plaintiffs, and Homer Hamilton & Co. are defendants in equity. Taken by agreement on notice which is hereto attached, and at the time and place therein specified. Present for complainants, A. McCallum, esq.; for defendants, Thomas W. Sanderson.

ALLEN HELLEVELL, of lawful age, being first duly sworn as hereinafter certified, deposes as follows, to wit:

Examined by, SANDERSON, for defendants:

Q. 1. State your age, name, and your present place of residence.

(A. McCallum, counsel for complainant, objects to the taking
100 of the testimony of this witness for the reason that the defendants did not state that he had prior knowledge, or had used the thing patented, and did not give his name and residence in the answer to the bill of complaint.)

A. Age, 40; name, Allen Hellevell; residence, Youngstown.

Q. State your present occupation, and how long you have been engaged therein.

A. Keeping books; have been engaged ten days in that.

Q. State what connection, if any, you have had with the manufacture of pig-iron, and where.

A. I have been at furnaces, connected first in the capacity of bookkeeper; afterwards as superintendant; for last 20 years at Briar Hill, New Castle, Pa., Jackson, Ohio, and Lowellville, Ohio.

Q. State what you know, if anything, as to the use at the furnaces where you were employed of the runners made at the furnaces for the purpose of being resmelted or manufactured into pig-iron, prior to October 1st, 1873.

A. We have always been accustomed to resmelt them, by putting them back into the furnace.

Q. State how long ago you knew of that use to be made of them.

A. 20 years.

Q. State at what furnaces, and by whom owned.

A. At the Briar Hill Furnace, owned by David Tod; New Castle, by
Rice, Richards & Berger; at Jackson, by Jackson Iron and Coal
101 Company; at Lowellville by Mahoning Iron Company.

Q. Please explain the manner in which the runners were used for the purpose of making pig-iron.

A. We used it just as we did scrap, filling it at the top with other stock in the furnace.

Q. State when and where it was you first knew these furnace runners to be so used.

A. As far back as I had anything to do with furnaces; say at Briar Hill Furnace 20 years ago.

Q. State how these runners of which you have been speaking are formed, and of what are they composed?

A. They are formed in the runner at the last end of the casting operation, more particularly when a furnace is working slug'ishly, and is composed of partially melted stock.

Q. State what other material was used, in the instances you have given, in connection with the runners in order to make pig-iron.

A. Coal, iron, and limestone.

Q. State whether or not, the runners were used instead of so much ore with the coal and fluxing material.

A. Yes.

Q. State what difference there is, if any, between these runners, so called, and furnace slag so called.

A. A very large difference in the percentage of iron contained.

Q. What is understood by the term slag by furnace men generally? What does it include?

102 A. Slag is what is put in the furnace as flux, and what there is in ore and coal that does not enter into pig-iron.

Cross-examination by Mr. McCALLUM:

X Q. How long were you acting as bookkeeper, and at what furnace were you so acting?

A. First period of six years at the old Briar Hill Furnace, commencing in 1856. Then at Grace Furnace, Briar Hill, 2 years.

Q. Have you acted in the capacity of bookkeeper at any other furnace than these?

A. Not exclusively as bookkeeper; have kept books in connection with superintendant or assistant superintendant.

Q. When and where did you first act as superintendant of a blast-furnace?

A. In 1864 at Briar Hill furnace, in Youngstown township, Mahoening County.

Q. In whose employment are you now?

A. Arms, Bell and Co.

Q. How long were you at Jackson, Jackson County, Ohio? State at what furnace you were employed, and in what capacity.

X A. Something over two years; at Diamond Furnace, as superintendant. I went there in the fall of 1865.

X Q. Are you familiar with the process of casting pig-iron at a furnace?

A. I am.

Q. Please give the technical names or terms of the different

103 parts of the pig-bed or sand-mould used for casting pig-iron.

A. Sand-beds when run into sand, chills when run into beds of cast iron formed for that purpose.

Q. What is that portion of the bed or chill called in which the pig-metal is cast?

A. Sand-beds when run into sand, chills when run into beds of cast iron formed for that purpose.

Q. What is that portion of the mould called which leads from the furnace and conducts the metal to the other parts of the moulds?

A. We call it the runner.

Q. Did you ever hear it called anything else?

A. No, sir.

Q. What is that portion of the mould called which leads from the runner to the other portions of the moulds?

A. The sow.

Q. Now, can you answer the question previously put to you as to the name of the portion of the mould in which the pigs are cast?

A. Haven't any particular name but pig, or pig-beds.

Q. How is the runner made?

A. It is made from sand usually thrown up a little higher than the beds.

Q. Did you ever know of the runners being made out of any other material than sand?

A. Only a short part; anywhere from 6 to 10 ft. long, made of cast iron that goes up close to the furnace.

Q. What is that portion called?

A. The trough.

104 Q. In the process of casting from the furnace is there any of the metal left in the runners?

A. Yes; a small portion when the furnace is working well; more when the furnace is working badly.

Q. Is this metal the same as the metal in the pig-bed?

A. When furnace is working well and iron runs freely, it will be the same only very thin and mixed some with the sand in the runner. When furnace is working badly, the runner will sometimes be full of different materials, from clean pig-iron to half-melted stock and cinder.

Q. How much fall do you give to the runner from the trough to the sow?

A. To the lower end of the bed, say from 12 to 15 inches.

Q. What is the length of the bed?

A. From 10 to 12 feet.

Q. Do you not use more than one sow and pig-bed connected with the same runner?

A. Use a number.

Q. Which is first filled?

A. The one farthest from the furnace.

Q. If the furnace was working badly as you state, would not the next in series receive the same metal as that in the runner?

A. It would be about the same until the last end of the cast. The last bed is sometimes filled with about the same material as the runner.

105 Q. Have you no provision to prevent the slag or cinder from running into the beds?

A. Yes.

Q. State what it is.

A. In the form of a plate set on edge across the runner, above which they put sand.

Q. Is this plate in the trough, or in the runner near the trough?

A. Some eight or ten feet as the case may be, below the trough, between the first pig-bed and the furnace.

Q. Did you ever know of the metal below this plate being put back into the furnace for the purpose of resmelting?

A. I have known of the material below the plate being put back into the furnace. Sometimes stock half melted will escape under the skimmer in that condition, it being very hard to separate it from the pig-iron.

Q. What do you mean by stock?

A. Material we put into the furnace, consisting of coal and coke, ore and flux.

Q. Then you mean to say that this material in a half-melted condition finds it way into the runner at a point below the skimmer, in the process of casting?

A. Yes, at times.

Q. Is this the material which you refer to in your direct examination under the term runners?

A. This and all we find in the runner that has a large percentage of iron, yet not clear iron, or clean iron, we term runners.

106 Q. How long has it been so termed runners?

A. I never knew it called anything else.

Q. What are the ingredients in the material you just refer'ed to as containing a large per cent. of iron?

A. Iron and flux unseparated.

Q. What would what you term "half-melted stock" be composed of?

A. Iron and flux unseparated.

Q. All you find in the runner except pure iron is this half-melted stock composed of iron and flux, is it not?

X A. No, you find cinder also.

Q. What is the difference between cinder and slag, if any?

A. Some might term these runners slag, while cinder is lighter and contains a very much less per cent. of iron. Properly speaking cinder and slag are the same. What is generally termed slag in the books we term cinder. We don't use the term slag much here.

Q. While at the furnaces you have enumerated in your direct examination did you ever know of this material which you term runners being hauled out and dumped on the cinder pile?

A. No, sir.

Q. Did you ever know of its being hauled out and dumped on the cinder pile of other furnaces?

A. I don't know.

107 Q. Did you never see this material on the cinder piles of the furnaces at New Castle or elsewhere?

A. I may have seen some just as I would pieces of scrap iron which sometimes get out with the cinder.

Q. Did you never see it used for mending roads with, or for building embankments or walls?

A. Yes, I have seen pieces of that material in such places.

Q. While employed at the Briar Hill Furnace, as you have testified, did you ever know of this material being sold to other parties?

A. No.

Q. Was any sold by Reis Richards, Berger?

A. None to my knowledge.

Q. Was it all used in the manner you have stated by these parties; that is, put back into the furnace?

A. Yes, except what may have been taken to the cinder-dump by the carelessness of employees.

Q. What kind of a furnace do you refer to in your direct examination?

A. A blast-furnace.

Q. Did you ever put it through a cupola furnace?

A. No.

Q. You have stated that in putting it through a blast-furnace you have used it in connection with coal, ore, and limestone; in what proportions have you so used it?

108 A. Just as we do scrap, just as we make it when furnace is working well.

Q. What percentage of iron is contained in this material you have been putting back into the furnace?

A. Never used enough of it at one time to know definitely.

Q. Can't you form an estimate, comparing it with ore itself?

A. Think it will compare with the best ore we have; better, I think.

Q. How much does the ore yield?

A. Best ore, 66 per cent.

Q. Do you know of any of this material having been sold by furnacemen to the defendant Homer Hamilton & Co.?

(Objected to by defendants' counsel as not being cross-examination.)

A. I have no personal knowledge.

ALLEN HELLAWELL.

Also, at the same time and place, WILLIAM B. POLLOCK, a witness called and sworn in behalf of defendants, testified as follows:

Q. State your name, age, and place of residence.

A. William B. Pollock; age, 43; residence, Youngstown, Ohio.

Q. State what experience, if any, you have had in the manufacture of pig-iron, when it began and at what places, giving the names
109 of the furnaces or manufactories, their location and names of owners.

A. Have been in the business 20 years on and off. Commenced at Briar Mill Furnace, owned by James Wood and Co. Was there about 2 years as assistant manager. Was at Wampum Furnace, Lawrence Co., Pa. Was there as manager about one year, owned by Porter, Friend & Co. Next at Eliza Furnace, owned by James Laughin & Co., about two years. Since leaving there have been engaged in building blast-furnaces until two years ago. After that for a year at Briar Hill Iron and Coal Company Furnace, which includes the furnace first named and two new ones. Was manager at Laughlin & Co., and at Briar Hill Iron and Coal Co's furnaces.

Q. State what knowledge, if any, you have concerning the use of furnace-runners, or the slag and refuse from blast-furnaces, for the purpose of reducing the iron therein to pig-iron.

A. I was always accostomed to put this stuff back into the furnaces.

Q. What was commonly understood by furnace-men by the term furnace-runners?

A. It is a kind of mixture of slag and iron that runs out at the last of the casting.

Q. State whereabouts it is ordinarily formed and deposited.

A. It is generally formed in the trough up near the furnace,
110 hardly ever gets below the skimmer in any quantity.

Q. Explain what you mean by the trough, and where it is located in the furnace.

A. The trough is of cast iron and is the commencement of the runner. The trough commences at the dam-plate, extending about 10 feet toward the pig-bed.

Q. What do you mean and what is generally understood by the word skimmer?

A. It is a plate of iron placed edgeways across the runner and knocked down to the surface of the pig-metal, in order to keep the slag which floats on the pig-metal from running into the pig-bed; the slag is conducted by another runner away.

Q. What use during the time you have been engaged in the furnance business has ordinarily been made at the furnaces you superintended of these runners and material deposited in the trough in casting?

A. They were gathered each day and taken to the stock-house, and broken up and put back into the furnace.

Q. Where and at what furnace did you first know such use to be made of that material?

A. At the Briar Hill Furnace in the year 1854.

Q. State whether any part of that material, either at that furnace or at any of the other furnaces at which you were engaged, was thrown upon the cinder or refuse pile, or deposit.

A. None that we could help.

111 Q. State what knowledge, if any, as to the same use and the same mode of use of that material at other furnaces with which you were not connected.

A. Some managers of my acquaintance thought best not to use it.

Q. What would you say as to the use of these furnace-runners in the following manner, to wit: 1st. By breaking or pulverizing the material into small pieces and then placing a bed of coke or raw coal in a furnace, and on the top of the fuel a quantity of this material thus broken up; and secondly, a quantity of limestone sufficient to flux it, sprinkled or placed either with the runners and fuel, or on top of it in the furnace, being either new or unknown, or not in common use at blast-furnaces in this section of the country prior to October 1st, 1873, for the purpose of making pig-iron?

A. I never used enough previous to 1873, at one time, to say that it would work without any other mixture of iron ore.

Q. In making it as you have stated as was done at the furnaces you have mentioned, state particularly how it was done, and what other material was mixed with it, if any, and about what proportions.

A. We gathered what was made each day with the scrap, and they were broken up together in small pieces, and then it was apportioned to each charge so as to use it all. The charge consists of a certain amount of coal or coke, ore, and limestone as flux.

112

Q. What you mean, then, is that you never run the furnace on this material without being mixed with ores?

A. Yes, sir.

Q. What knowledge have you, if any, as to furnaces sometimes getting into a condition in which it becomes necessary to use pig-iron or scrap, or both, in order to bring the furnace again into good working condition?

A. It is a frequent necessity.

Q. In your experience state whether or not, when a furnace got in the condition named, you ever used the runners alone, or in connection with the scrap, in order to cause a change in the working of the furnace, and in so doing made pig-iron in any quantity from the runners, or from the runners and scrap.

(Objected to as leading, the witness having already said he did not use it except when mixed with iron ore.)

A. I think I used the scrap alone in such cases.

Q. In the use of furnace-runners in the manner you have above mentioned in connection with ores and the other material used in the charge, state what diminution, if any, you made in the amount of ore used in the charge, or other material composing the charge.

113

A. We put it on in place of the ore.

Q. Then do we understand that you used the runners in place of the ore?

A. Yes, sir; that is not the usual custom, but that is the way I done it.

Q. State what difference there is, if any, to your knowledge, in the effects between the use of furnace-runners in the mode you have mentioned and the ordinary use of scrap iron, either upon the working of the furnace or in the iron made.

A. I could see no difference as I used it.

Q. What do you say as to the use of furnace-runners in blast-furnaces during the last 20 years in the Mahoning Valley, for the purpose of manufacturing the same into pig-iron in the manner you have mentioned, being either new or not in general use?

A. It was not new to me. I was taught that way. I think all the furnaces in the Mahoning Valley used it.

Q. State what is generally understood among manufacturers of pig-iron by the words furnace slag, and what is the distinction or difference,

if any, between what is called furnace-runners and the furnace slag or cinder?

A. Slag is a lighter substance than pig-metal, looks like stone, sometimes like glass; it is composed of the ash of the fuel—the flux and the dross of the ores. The furnace-runners are composed of glob-
114 ules of iron from the size of shot to the size a pea, and what I conceive to be slag.

Q. What difficulty is there on the part of furnace-men in determining the presence of metal'ic iron in the material mentioned, in the mass of the material as it comes from the furnace after it has cooled?

(Objected to by counsel for complainants.)

A. There is no difficulty.

Q. Taking, then, a mass of this cool material which contains iron in the globular form you have mentioned, what is that mass commonly called?

A. Trough-runners.

Q. What name is ordinarily given to that portion of the material which is drawn from the furnace in a molten state at what is called the cinder notch, and which does not contain iron?

A. Slag and cinder.

Q. What difference, if any, is there between the material last mentioned and the material which holds and cements together the globules of metal'ic iron contained in trough runners?

A. I think they are the same.

Q. State what changes take place in iron ore, chemical or otherwise, after the same is placed in a blast-furnace, in the process of extracting therefrom metallic iron; explain fully.

A. It is in the first place carbonized, then it is melted with the flux, and the iron drops and the flux and dross of the ore float on top
115 of the metal'ic iron.

Q. Now please state whether or not the chemical change you have mentioned in regard to the ore takes place in smelting trough-runners or scrap, or whether anything more is necessary than the application of sufficient heat to simply melt the last-named material in order to obtain from it the metal'ic iron?

A. The chemical change does not take place in smelting trough-runners or scrap. All I think required is sufficient heat.

Q. What difference, if any, is there then between the smelting of trough-runners and scrap iron, and the ordinary mode of melting pig-iron (objected to for the reason that no foundation has been laid for the examination of this witness as an expert in the working of pig-metal in other than the blast-furnace) by the application merely of sufficient heat for that purpose?

A. I do not know. I have no means of knowing.

Cross-examination by counsel for complainant:

X Q. In your direct examination you say you never used enough of furnace-runners at one time to say that it would work without any other mixture of iron ore, and again, in describing how you made use of them, you gathered what was made each day, broke it up, and then ap-
portioned it to each charge until all was used, and that you never
116 used it without being mixed with ore; is that correct?

A. Yes, sir.

Q. In another place you say that you used it in place of the ore in the charges; do you mean to be understood that you substituted the runners entirely for the ore in making up these charges, or that when

you used it you used a portion of ore and a portion of the runner; that is, when you used the runner you used less ore?

A. When I used the runner I used less ore, but never used the runner without the ore.

Q. How are the ordinary charges of a blast-furnace made, stating the materials and their proportion?

A. The ores and flux are generally of nearly equal weight, and the charges about 20 hundred pounds of each.

Q. How is the furnace charged with the material?

A. The fuel is put in first and covered with the ore and flux mixed.

Q. This mixture of slag and iron, which you have called trough-runners, have you ever used it by itself in a blast-furnace; that is, without the ore?

A. No.

Q. Have you ever used it in a cupola furnace?

A. No, sir.

Q. Have you ever seen it used in a cupola furnace?

A. No, sir.

Q. In your direct examination you have stated you thought all the furnaces in the Mahoning Valley have used their trough-runners
117 the same way you did; do you speak from your own personal knowledge or from hearsay?

A. From hearsay.

Q. Can you enumerate the furnaces in this Mahoning Valley? If you can please do so.

A. Lowell Furnace, Struthers, Hazelton, Himrod's, Hubbard, Brown, Bonnell and Co., Eagle Furnace, Briar Hill Iron Co. Furnace, Girard, Niles, Wm. Ward's Furnace, Warren, Mineral Ridge.

Q. Have you visited these different furnaces from time to time in the last 20 years, or at any time?

A. I have frequently, up to 3 years ago.

Q. Have you seen any of these trough-runners of this material composed of slag and iron in or about the cinder dump or piles of any of these furnaces?

A. Yes, sir.

Q. Have you seen it in any quantity?

A. No, sir.

Q. Do you know whether at any time within the period you have mentioned *if* it has been sold to foundry-men by furnace-men?

A. I have no positive knowledge.

Q. Do you know if it has been quoted in the market at any time as an article of commerce?

A. No, sir.

Q. From your experience as a furnace-man can you state whether or not you ever saw stock in a half melted condition in the pig-bed or runners of the sand-mould?

A. Never in the regular course of the making of a furnace.

118 Q. Would it be possible for stock in a half-melted condition to fall below the tuyeres unless some accident to the furnace occurred?

A. I think it would be possible at casting time when the crucible is entirely empt'ed.

Q. Did you ever see the ore come down below the tuyeres?

A. Yes, sir.

Q. In such case would it not be necessary to remove the ore or fuel which had fallen down below the tuyeres?

A. No, sir.

Q. Please explain how the ore and fuel that has fallen below the tuyeres is smelted or reduced.

A. It is raised again from the bottom by the molten iron and slag.

Q. The material which you have called the trough-runners, composed of slag and iron, did you ever know it under the name of half melted stock?

A. I have heard it called that.

Q. Is it so in fact?

A. I think not.

Q. What would you understand by the use of the term "refuse of blast-furnaces;" would it not be anything that was thrown away or dumped into the cinder pile?

A. Yes, if done purposely.

Q. In stating the chemical changes which take place within the blast-furnace you say that the iron ore is first carbonized and then melted; please explain the process of carbonization. What causes it?

119 A. It is carbonized by the aid of the gases in the fuel, the first charge at the tuyeres carbonic-acid gas is made, and then afterwards is changed to carbonic oxide by the descending stock, and the ore by its association with the fuel and the gases and by the aid of heat absorbs carbon.

Q. Do you know the chemical analysis of the ores?

A. Not all of them.

Q. In your direct examination you say that some furnace managers of your acquaintance think it better not to use the trough-runner material, by putting it back into the blast-furnace; did they assign any reason for their opinion?

A. They said they thought it spoilt the quality of the iron.

Q. In mixing the runner material with the crude ore for reduction in a blast-furnace, which would be first reduced to the metal'ic state, the ore or the slag containing iron, or would they both melt at the same time?

A. I would think they would melt nearly at the same time.

Q. You have stated that no chemical change would take place in the slag containing iron, while in the ore there is, said change being the carbonization of the ore; would the metal in the slag not also become carbonized when subjected to the carbonic-acid gas evolved by the fuel and flux?

A. I think it probable.

Q. Would not therefore this portion of the metal which had
120 twice been subjected to the carbonizing process be more highly carbonized than the metal reduced directly from the ore?

A. I cannot tell.

Q. Supposing a pig of metal to be composed of two different kinds of metal, that is, one portion more highly carbonized than the other, would such pig be of equal value with one of uniform carbonization?

A. It would not.

Q. Suppose that this mixture of slag and iron were broken up and reduced or melted in a cupola furnace with suitable fluxing material, would not the product be a uniform iron?

A. I should think it would.

WM. B. POLLOCK.

At this point adjourned till 9 o'clock to-morrow morning.

THURSDAY MORNING, *March 11th*, '75

Met pursuant to adjournment.

WILLIAM POLLOCK, a witness called on the part of the defendants, testifies as follows.

1st question (by defendants' attorney). State your name, age, and place of residence.

A. William Pollock; over 60; Youngstown, Ohio.

Q. State how long you have been engaged in the furnace business, at what places, an' in what capacity.

121 A. Since 1847; at Briar Hill, owned by James Wood & Co.; then Massillon for Massillon Iron Company, there about five years; then returned to Youngstown to Samuel Crawford and Co.; then Brown, Bonnell and Co., Youngstown, 4 or 5 years; then to Briar Hill for Briar Hill Iron and Coal Company, of which company I am a member, as superintendant running the furnaces.

Q. For how long have you been a stockholder and member of the Briar Hill Iron and Coal Co.?

A. About 8 or 10 years.

Q. During that time who has had the immediate management of the furnaces of that company?

A. I have had the management up to within a little over a year; since that time have not paid much attention to it.

Q. State what knowledge you had, if any, prior to Oct. 1st, 1873, of the use of trough-runners at furnaces for the purpose of resmelting in blast-furnaces in order to reduce the metal'ic iron therefrom.

A. I always used it; had it broken up and taken up the same as scrap.

Q. How many years is it since you first used it or knew of its use for the purpose aforesaid?

A. I have always used it since I have been in the business; since 26 or 27 years ago.

Q. State what knowledge you have as to its being used by others at furnaces with which you were not connected.

A. I knew other furnaces to use it, and some did not use it.

122 Q. State how long ago you knew this material to be used at other furnaces not superintended by you.

A. Cannot state how long.

Q. State about how long.

A. About 10 or 12 years, probably, since my attention has been drawn that way.

Q. Please explain particularly how you used the material mentioned at the furnace superintended by you.

A. Just about the same way we used the scrap; took it right up with the scrap.

Q. What do you mean by the scrap, and how is it made?

A. Scrap is iron that runs off in among the sand not in a good shape for pig-iron.

Q. State whether you used this material alone, or in connection with ores.

A. In connection with ores.

Q. What difficulty is there for furnace-men to determine the presence of iron in the trough-runners of a furnace?

A. No difficulty at all.

Q. For how many years have you known that the trough-runners of

blast-furnaces contained globules of metal'ic iron that could be reduced therefrom by resmelting?

(Objected to as leading.)

A. I have known that as long as my experience in the iron business.

Q. State what knowledge you had, if any, at the time you
123 superintended the old Briar Hill Furnace and the Massillon furnaces, as to the existence of globules of metal'ic iron in trough-runners of those blast-furnaces.

A. You could see the iron in the runners the same as in the scrap; if we could not see the iron we did not use them.

Cross-examination:

X Q. In your answer to the last question you say that you did not use the runners if you did not see the iron in them. What did you do with those you did not so use?

A. Haulèd them out and throwed them off as a dump.

Q. How is this runner formed?

A. It is formed in the trough.

X Q. I infer from your previous answers that some portions of the runner contain more iron than others. Is there much difference in the amounts of iron contained in the slag of which these runners are composed?

A. There is; there is a great deal more iron contained in the runners close to the tapping-hole or draw than there is at the other end of the trough.

Q. Does any portion of the runner ever contain stock in a half-melted condition?

A. Yes, it does, very often; when the furnace is working badly the iron won't run—won't leave the trough.

Q. Do you mean as stock unmelted ore and other fluxing material, or metal'ic iron?

124 A. I mean metal'ic iron not fluid enough to run.

Q. When a furnace is working badly, and the iron won't leave the trough, the metal will not of course get into the pig beds, will it?

A. No, sir.

Q. Then in such case do you not suspend the opperation of casting, or what do you do?

A. We suspend the opperation of casting until the furnace heats up or otherwise chills up.

Q. This metal which will not run, is it easily distinguishable from the ordinary trough-runners?

A. Yes, sir; it is nothing but iron.

Q. The ordinary trough-runner is iron and slag, is it not?

A. Yes, sir.

Q. Does not this mixture of iron and slag present ordinarily a grayish color similar to the color of ordinary slag?

A. Yes, it does a good deal; you can tell by the looks and weight whether there is iron in it.

Q. Is it not sometimes called heavy slag?

A. Yes, sir, it is.

Q. Suppose the percentage of iron was very small, would it be easily detected in a runner by a casual examination of it?

A. Well, it would have to be very small if you could not detect it.

Q. To a person who is not skilled in the art of iron making, would the difference between this heavy slag and slag without iron in it be easily perceptable?

125 (Objected to upon the ground that farmers do not make iron.)

A. No; a man would not know anything about it, whether there was iron in it or not; wouldn't know whether it was iron or cinder.

Q. Have you ever used these runners or heavy slag in a blast-furnace by themselves, that is, without being mixed with ore?

A. No, sir; I never have.

Q. Have you ever used them in a cupola furnace?

A. No, sir; I have not.

Q. Since 1847 up till October, 1873, did you ever know of their being used in a cupola furnace in your experience of iron making?

A. No, sir; I never did.

Q. Are you familiar with the chemical changes which take place in a blast-furnace?

A. Nothing more than I know the effect produced by the change of the stock.

Q. The ore undergoes a change by becoming carbonized by the gases of combustion, does it not?

A. Yes, sir.

Q. Does the vapors of combustion have any effect to carbonize the iron contained in the slag of the runners when put through the blast-furnace, or is there any difference in the effect that you have observed between the ore and the runners, in this respect?

A. I have never known any material change except when you put on too many of them.

126 Q. What is the effect when you put on too many of them?

A. The effect is they cool the furnace if you have not fuel enough to keep up the heat.

Q. The consequence of allowing the furnace to cool too much is that which you have before spoken of, to wit, that the metal will not run out of the trough, and the furnace sometimes gets chilled, is it not?

A. Yes, sir.

Q. That involves a great loss, does it not?

A. Yes, sir, it does; quite a loss.

WILLIAM POLLOCK.

Also, at the same time and place, JOB FROGGETT, a witness called and sworn on the part of the defendants, testified as follows:

1. Q. (by def't' solicitor). State your name, age, and place of residence.

A. Job Froggett; age, 45; Youngstown, Ohio, place of residence.

Q. State your present occupation, and how long you have been so engaged.

A. Blast-furnace superintendant; 10 years.

Q. For whom and where have you been engaged during that time?

A. For Brown, Bonnell and Co., in Youngstown.

Q. What was your occupation prior to that time?

A. Blast-furnace engineer.

127 Q. How long altogether have you been engaged in and about blast-furnaces?

A. 25 years.

Q. When did you first know, if ever, that trough-runners of blast-furnaces contained metallic iron?

A. I have known it for 15 years.

Q. How long, if at all, have you known them used at blast-furnaces for resmelting?

A. I have known of their use for 15 years, but I have known the cin-

der of a blast-furnace, that is, the iron to be taken out of the cinder, for 30 years.

Q. Where was it that you knew the iron to be taken from cinders 30 years ago, of which you speak?

A. In the State of New York, Orange County, at Southfield Furnace, owned by Peter Townsend.

Q. State what kind of a furnace that Southfield Furnace was as to the use of fuel.

A. Charcoal for fuel; cold blast.

Q. State whether or not the material from which the iron was extracted was or was not the runners.

A. As near as I can remember it was the runners and all the cinder in the shape of slag.

Q. How was it done?

A. It was done through what we call erecting a stamping mill, and the cinder separated from the iron by the use of water.

Q. State what knowledge you have as to the use of trough-runners of blast-furnaces for the purpose of being resmelted in order to make pig-iron prior to October 1st, 1873.

128 A. I have used them for the last 8 years, putting them back into the blast-furnace, laying more store by them than by our best ore.

Q. In order to resmelt trough-runners made by blast-furnaces in order to make pig-iron, what more, if anything, is necessary than the application of sufficient heat to melt them?

A. Nothing more.

Q. Please state particularly what would be the process of preparing and blowing in a blast-furnace in which you were using trough-runners, either alone or in place of ore, or in connection with ores and the other materials.

A. We do not use them blowing in for the reason that we do not have them at that time.

Q. Suppose you had a furnace already in blast, explain how these runners are ordinarily used?

A. The way I use them, if we have a large quantity, we divide the amount we have on hand into barrows that we use for filling the furnace.

Q. State whether or not before using the runners, you pulverize or break them up.

A. No, sir; we don't pay much attention to breaking them up. They join sometimes in pieces as large as a man can lift; every barrow we use, we use a certain amount of limestone.

Q. In cases where you have used these furnace-runners, at the
129 time you commenced to use them, what would there be at the top of the burden of the stack in the way of material upon which the charge containing the runners was dumped?

A. They would be dumped on coal or coke, or whatever fuel we were using.

Q. Then explain the process of charging the furnace as to the use of fuel, and this material and other material after commencing such use of the runners.

A. I make no difference, these runners take the place of a barrow of ore.

Q. What difference is there, if any, in the process of the use or the other material used in order to make pig-iron in blast-furnaces between the use of trough-runners in the way you have stated, and the use for

the same purpose of scrap iron and broken-up pigs that accumulate at blast-furnaces?

A. I make no difference; I use the runners the same as other scrap; I use a little limestone with the runner, do not use it with the scrap.

Q. What is the difference in value, if any, between a ton of ordinary scrap iron and a ton of ordinary trough-runners?

A. That would depend on the richness of the scrap iron; some is a good deal better than others. I set as much value by the runners as by the scrap of an ordinary kind.

Q. What do you say as to the use of trough-runners prior to October 1st, 1873, for the purpose of resmelting by the application of sufficient heat for that purpose, and a sufficient quantity of limestone to flux it by means of ordinary blast-furnace, being either new or generally unknown in the Mahoning Valley?

130

A. They have been generally used right along for the last 15 years; for the last 8 years we have used them altogether, and have not wasted a particle as far as we could see.

Cross-examination:

X Q. In your direct examination you have stated that 30 years ago you knew of iron being recovered from blast-furnace cinder by process of stamping and washing; was this iron found all through the cinder?

A. Yes; as far as I know they made no difference in selecting it; all the cinder was put through the stamp.

Q. What was done with the metal after it was separated from the cinder by pulverizing and washing?

A. It was put back into the furnace as scrap.

Q. You stated that you laid as much store by the trough-runners as you would by the best ore, and again that you set as much value on them as you would on ordinary scrap; do you mean to be understood that you consider them of equal value, weight for weight, with the best ore and with scrap?

A. Yes, sir; I do.

Q. Have you ever used them in a blast-furnace by themselves, that is, without there being ore in the furnace at the same time with them?

131

A. No; I never used them by themselves.

Q. You said that when you have a large quantity on hand you divide them up into different charges, do you dump such charges into the furnace in succession or intermediately with charges made up of ore, fuel, and such material?

A. Intermediately.

Q. Then they always are mixed with ore in the furnace, are they not?

A. Yes, sir.

Q. Have you ever, in your experience, used any of this material which had been purchased from other furnaces?

A. No; we have not.

Q. Prior to 1873, have you ever known of this material having been sold in the market?

A. No, sir; I have not.

Q. You have stated that it is the custom in the Mahoning Valley to use the trough-runners in the same way as you have used them; do you make this statement from your own knowledge or from hearsay?

A. From hearsay.

Q. Did you ever use trough-runners, or other kinds of slag or cinder of the blast-furnace in a cupola furnace?

A. No, sir.

Q. Have you ever heard of any objections made by furnace-men to the use of such material in the blast-furnace?

132 A. Yes, I have; some do not like to use them.

Q. Did they give any reason for not liking to use them?

A. Some of the reasons are they are hard to smelt.

Q. Is it not sometimes difficult to keep up the heat in a blast-furnace when the stock smelts with difficulty?

A. Yes, it is; we have to use more fuel.

Q. In your experience, have any of the furnaces under your charge become chilled from this cause?

A. No, sir.

Q. Are you familiar with the chemical changes that take place in the blast-furnace when the ore is being smelted?

A. No, sir; I am not.

Q. Do you know whether or not the ore becomes carbonized by the action of the gases of combustion before it is melted?

A. Yes, sir; it must be.

Q. What is the effect of carbon on metal'ic iron when in a fused state?

A. That I am not altogether able to state.

Q. What is your opinion to the best of your knowledge?

A. I cannot say anything about that.

Re-examination:

Q. In cases where furnaces chill, what is ordinarily done with the chilled mass or salamander at the bottom of the stack, in the

133 way of resmelting any portion of it?

A. We break it up and smelt it over.

Q. What difference, if any, is there in the mode of resmelting that material, and in resmelting trough-runners and scrap iron?

A. Not any.

Q. Do you know of any person having or pretending to have any patent for resmelting salamanders?

A. No, sir; I do not.

Recross-examination:

Q. In your direct testimony you have stated that you never had a furnace chilled with you. Speaking of the salamanders, do you refer *do you refer* to furnaces under your charge or others?

A. Yes; under my charge. I mean the salamander taken out after the furnace has blown out.

Q. What is that salamander composed of?

A. Pretty much all metal'ic iron.

Q. Is it all in one solid mass?

A. Yes, sir.

Q. About how much will it weigh?

A. I suppose the one we have down there now will weigh 30 tons.

Q. How do you break it up?

A. By drilling and the use dualin.

Q. How long since you first began to break up these masses of iron in this way?

A. About a year ago.

Q. What did you do with them before that time?

134 A. We tumbled them over the bank for the reason that we could not break them.

Q. Then you treated them as refuse material?

A. Yes, for the reason that we could not break them.

Q. Who first proposed to break them up in this valley?

A. Mr. Bigelow, I believe, brought the material here; that is, the dualin. It was first done at the Himrod furnaces.

Q. Who by?

A. By Mr. Bigelow himself.

Q. Can you fix the date of this?

A. No, sir; I cannot. It was over two years ago that he broke them so they could be taken out of the stack.

Q. Can you fix the date when they were first broken up into such small pieces that they could be resmelted in the furnaces?

A. In the summer of 1874.

Q. Prior to that date they were treated as refuse material and thrown out, were they not?

A. Yes, for the reason that we had nothing we could break them with but powder, and that would not do it.

Q. Is not all which is thrown away on the cinder-dump of blast-furnaces as of no account—refuse material, in your estimation?

A. As a general thing it is.

Re-reexamination:

135 You have said in your cross-examination that the mass called salamander taken from blast-furnaces, after being blown out prior to the introduction of dualin, were dumped on the refuse-pile. How was it, prior to that time, as to the breaking off from the mass such parts of it as could be removed by sledges and chisels or otherwise, and resmelting those pieces in the furnaces the same as runners or scrap?

A. Oh, yes, that has been done, but the main body of the salamander could not be broken up.

Q. For how long have you known parts to be broken off from the salamander as above mentioned, and used for resmelting as above mentioned?

A. For 10 years.

Q. You have said in your cross-examination that these salamanders are principally composed of metal'ic iron. Please state what other material is ordinarily attached to or mixed with the metal'ic iron on the outside of these masses and with the pieces ordinarily knocked off for resmelting?

A. It is a mixture of cinder and iron.

Q. When it is so, in what respect does it differ from furnace-runners?

A. I don't see that there is any difference. There is a difference in salamanders; some are made of all iron, and some are a mixture of iron and cinder.

136 Q. How is it as to some parts of the runners of furnaces, especially that portion of them nearest the tapping-hole sometimes being almost pure metal'ic iron?

A. Well, when the furnace is working cold the iron runs very slug'ish; the runner is most pure up near the tapping-hole.

Q. Those parts of salamanders and the other material thrown on the refuse-pile, as you call it at blast-furnaces, is owned by whom?

(Objected to as immaterial.)

A. The owners of the furnace.

Re-recross-examination:

(Any further cross-examination objected to by defendant's counsel.)

Q. Suppose refuse from a furnace be hauled out and dumped in the

streets of a town for the purpose of repair, to whom do you suppose the refuse material would belong?

A. I suppose it would belong to the public.

Q. Suppose it were dumped on private property not belonging to the furnace, whose would it be then?

(Objected to by defendants.)

A. If it was taken off the company's premises it would be no longer theirs.

Q. Is it not true that cinder is lighter than the melted iron and floats on top of it in the furnace?

(Objected to by defendants.)

A. Yes, sir; it is.

Q. How, then, do you account for the salamander which was
137 formed beneath the hearth being a mixture of iron and cinder, as you have stated in your reredirect examination?

A. Salamander that lays below the hearth is generally pure iron; salamander that lays above the hearth is a mixture of iron, cinder, and coke.

Q. Is there any trouble experienced in breaking up this salamander, or unmelted stock, which forms above the tuyeres when the furnace is chilled?

A. Not very much; it is not so hard to break as that which forms below the hearth.

Q. Then the salamander about which you previously testified as being thrown out in the dump was pure iron, or nearly pure iron, and quite different from the material formed above the tuyeres?

A. Yes, I have known of pure iron salamanders being thrown away.

Q. Have you, since July, 1874, used any large quantity of this metal'ic salamander in the blast-furnace?

A. No, sir, we have not; the salamander which we have broken up, went to the rolling-mill to be worked in the puddling furnace.

Question by defendants' attorneys:

Q. What disposition has ordinarily been made, as far as your knowledge extends, of those salamanders, or masses formed by cooling above the hearths of blast furnaces, which were or could be broken up
138 during your experience as a furnace-man?

(Objected to by counsel for complainants, the witness having already stated that he never had a furnace under his charge chilled so as to form such a mass.)

A. Some have been thrown away, and some have been worked over, or pieces of them.

Q. What difference, if any, was there in working them over, and in the working over of trough-runners and scrap?

A. Have never found any difference, only we have had to use them in larger chunks than trough-runners and scrap.

Q. State what difference, if any, in the process or mode of working the pieces from these cooled masses, and the process of resmelting trough-runners, or scrap?

A. We don't like to put them in as often as we do trough-runners, or scrap.

Q. What other difference is there in the process, if any?

A. They are a good deal more troublesome to handle and get in the furnace. I don't see that there is any difference.

JOB FROGGETT.

Also, at the same time and place, JOHN R. GRIST, a witness called and sworn on the part of the defendants, testifies as follows:

139 (Counsel for complainant objects to the taking of the deposition of this witness, for the reason that the defendants did not state that the witness had prior knowledge, or had used the thing patented, and did give his name and residence in their answer to the bill of complaint.)

Q. 1st (by SANDERSON for respondents). State your name, age, and your present place of residence.

A. John R. Grist; Lowell, Mahoning County, Ohio; 47 years past.

Q. State your present occupation or business, and how long you have been engaged therein.

A. My present business is mining; partly engaged in it for 20 years in connection with the furnace business.

Q. State what connection you have had with the manufacture of pig-iron, when you began, where you have had connection with the same; how long at each place; names by which the furnaces were known; by whom they were owned, and in what capacity you acted.

A. Commenced in 1852, at a charcoal furnace known as the Eliza Furnace, at Niles, Ohio; was there one year as part owner. From there went to Lowell, Ohio. Purchased the Mahoning Furnace in connection with the Crawfords of New Castle, Pa. Was general manager there for seven years. Moselle Furnace, Missouri, was a partner and general manager for about 2½ or 3 years. Next at Brown Iron Company, located at Mineral Ridge, Trumbull County, Ohio; acted there as

140 general manager; was there about 2 years.

Q. State all you know concerning the use of furnace trough-runners at blast-furnaces prior to Oct. 1st, 1873, for the purpose of resmelting in order to make pig-iron.

A. Prior to the introduction of the rich ores in this valley, I used them. I have examined other furnaces where they were used. At the James Ward and Co. Furnace, at Niles, Ohio, they used them clear; they used them at Struthers'; that furnace was built after the rich ores were introduced.

Q. State about the date that the rich ores to which you refer were intrduced into this valley.

A. The first rich ore that I ever worked was in 1854. It was Lake Champlain ore.

Q. State the mode and manner in which to your knowledge, prior to October 1st, 1873, these furnace trough-runners were used in order to make pig-iron. State fully what you did with them for that purpose.

A. We used them as scrap when the furnace was working warm, in such quantities as to keep them cleared up.

Q. In the ordinary smelting of iron ores, what is used in the furnace-stack in the way of fuel and flux?

A. In a charcoal furnace we use charcoal, limestone, and ore. In a bituminous furnace, we use raw coal and limestone and ore, or coke, and limestone and ore.

141 Q. In the use of these trough-runners, what change, if any, was ordinarily made either in fuel, flux or blast?

A. None.

Q. State what more, if anything, was necessary in the ordinary use of these trough-runners than a sufficient quantity of heat to melt them, and of limestone to flux them in order to reduce them to pig-iron?

A. Nothing more.

Q. What chemical changes, if any, took place in the material after

being placed in the furnace, and what aid, if any, in the smelting of them was afforded them by the ores with which they were mixed in the charge?

A. I don't see if any chemical change took place in the material; I should think they would melt just as well without as with the ore.

Q. State whether prior to October 1st, 1873, you ever had portions or parts of the chills or masses of metal'ic iron and other material which hardened by cooling above the hearth in blast-furnaces broke off and resmelted in blast-furnaces.

A. I have worked some of them entirely over that I have taken out of the bottom of furnaces previous to that time.

Q. Please state in what respects, if any, that material differed, so far as the material of which it was composed was concerned, from the ordinary trough-runners of blast-furnaces, and what difference was
142 there, if any, in the process of resmelting them.

A. I always classed trough-runners, boils, and salamanders as furnace scrap; no difference in process of resmelting them. I mean by boil a formation of iron and sand in and under the runner.

Q. State what is commonly understood among furnace-men by the term runners, or trough-runners, and by the term slag.

A. A trough-runner is iron left in the trough after casting; slag is lime, silica, and earthy matters out of ore after the iron is extracted.

Q. What would you call a portion of the runner holding globules of metal'ic iron?

A. I always called it scrap, and throwed it in the scrap-box.

Q. Are you familiar with the mode of constructing and the manner of operation of ordinary foundry cupolas?

A. I have some little experience in them; have been about them a great deal.

Q. Suppose you take a cold blast furnace running with coke as fuel and using the ordinary limestone as fluxing material, and using furnace-runners and the material you have denominated scrap, either alone or in connection with ores, and an ordinary foundry cupola being operated also by cold blast, coke as fuel and limestone as flux, and using
143 trough-runners and scrap both for the purpose of making pig-iron; what difference, if any, would there be in the principles of their operation and results?

A. There is no difference in the principle of their operation, but the furnace will produce the best pig-iron.

Q. State whether to your knowledge prior to Oct. 1st, 1873, any of the furnaces known by you used these trough-runners when they were being operated with coke or charcoal as fuel and while running on cold blast.

A. I don't know of any using them while running on cold blast.

Q. Did any of the furnaces known by you prior to that date run with cold blast? And, if so, please state what ones.

A. All the furnaces that ever I was connected with used the hot blast, and I have no acquaintance with any furnace but one that uses cold blast, that is the Merrimac Furnace, Mo., charcoal as fuel.

Q. State whether to your knowledge prior to October 1st, 1873, there were any furnaces that used either raw coal and cold blast, or coke and cold blast, or charcoal and cold blast.

A. I know of no bituminous furnaces running on cold blast, or no coke furnaces running on cold blast, and but one charcoal furnace running on cold blast.

144 Cross-examination:

1st question (by A. McCALLUM, counsel for complainants.) How do these trough-runners run as to quality; are they uniform, or do some have more slag in themt han others?

A. They do not run uniform. When the furnace is working hot the trough-runners are light, that is, the trough is coated with a thin scale of iron, the balance being filled with slag; when the furnace is working cold, then the runners are filled with globules of metal'ic iron imbedded in what I consider to be lime.

Q. Are you familiar enough with the process of casting pig-iron to describe it? If you are, please do so.

A. I can describe it. First, we make up the pig bed where we cast in sand, then the runner from the pig bed to the furnace notch; immediately next to the notch is a cast-iron runner about 8 or 10 ft. long, ten inches wide on the bottom, about eight-inch sides; when the furnace is tapped the iron flows down said runner to the beds.

Q. Is there not a metal plate or skimming device between the furnace and first sow or pig bed placed across the runners for the purpose of preventing the cinder from flowing into the pig beds?

A. No, I don't use a metal plate; I use sand.

Q. Whereabout in the runner is heavy material, about which you have been testifying, formed?

145 A. From the notch to the runner leading to the cinder-mash, and not unfrequently I have seen it extending into the first pig bed.

Q. Have you ever worked a furnace with these trough-runners alone; that is, without there being ore in the furnace at the same time?

A. I never did.

Q. About what proportions have you used with the ore?

A. I have used about 100 weight of this to a barrow of ore. About 300 or 350 of ore to a barrow.

Q. In your experience, does this material require more or less fuel than ore?

A. I don't think it requires any more fuel than ore.

Q. Have you ever used a charge of it without being mixed with ore?

A. I never did.

Q. Then what you have stated with regard to the use of this material, in your direct examination, as within your own knowledge, has been with reference to its use when mixed with ore, and not when used by itself?

A. Yes, sir; that is the way I always use it.

Q. In your direct examination you say that there is no difference in the principle of operation between a cold blast furnace running with coke and charged with these furnace-runners and fluxing material, and a foundry cupola also operated by a cold blast, coke as fuel and

146 limestone as flux, said furnace being also charged with trough-runners. Did you ever use or see a cold-blast furnace running with coke and charged with these runners for the purpose of making pig-metal?

A. I never saw one so operated.

Q. Have you ever seen an ordinary foundry cupola charged with coke, limestone, and these trough-runners, and operated by a cold blast, for the purpose of making pig-iron?

A. No, sir.

Q. If you have never seen either in operation, how can you tell that there is no difference in the principle of their operation?

A. From the fact that you can produce a good quality of pig-iron from ores with a furnace-stack of a certain hight, say 45 feet, and using a stack 10 or 12 feet you would produce no pig-iron at all of the same quality, using the same fuel, material, and flux.

Q. Then you think there would be a material difference in the result accomplished by the use of the blast-furnace and the use of the cupola furnace, the former being 45 or 50 feet high and the latter about 12?

A. I think there would as to the quality of iron produced.

Q. The result being different, do you think the principle the same?

A. The melting principle would be the same in both stacks;

147 but the iron produced by the higher stack would be far superior to the iron produced by the lower stack.

Q. In what respect would it superior?

A. From the fact that the material producing the iron is longer in coming to the melting point in a higher stack than it is in a lower stack, and the scrap-iron or ore, both or either of them, will absorb a larger quantity of the carbon from the fuel.

Q. What effect has carbon upon fused metal?

A. It increases its value.

Q. What effect has it upon its texture; does it make it harder or softer?

A. It makes it softer in my opinion.

Q. Suppose iron to be subjected to this carbonizing process twice over, or once in the metal state and once in the ore state, would it be softer or more highly carbonized than if only once subjected to the process?

A. In metal'ic iron produced by the blast-furnace in once melting, with the proper amount of fuel, should be contained all or nearly as much carbon as if melted twice.

Q. Then you think it makes no difference in the softness or carbonization of iron whether melted once directly from the ore or subjected a second time while in the metal'ic state to the process of melting?

A. I don't think it makes any difference.

Q. Is not maleable iron softer than cast metal or pig-iron?

A. Yes, sir; it is.

148 Q. Why is it so?

A. From a process of annealing it in an oven prepared for that purpose.

Q. What fuel is used?

A. I think they use both bituminous coal and charcoal.

Q. Do you know positively?

A. I don't know positively which.

Q. Suppose two different materials, such as the ore and the iron in metal ovens contained in these trough-runners, to be placed together in equal portions in the same furnace, the one never having been carbonized, and the other having been carbonized previously, and both being now subjected equally to the action of the products of combustion of the fuel, would, in your opinion, the result be precisely the same on these two different materials?

A. Yes; of course it would be.

Q. Did you make this heavy slag or trough-runners when operating the charcoal furnace which you have mentioned in your direct testimony?

A. I did not.

Q. Do you know of any of these runners having been shipped from Lowell Furnace to any other place?

A. Yes; this year, about 2 months ago.
Q. Who were you shipping them to?
A. To Girard Iron Company. I have also sold a large amount from Mineral Ridge Furnaces; sold them to the Struthers Iron Co.;
149 sold them in May, 1872.

JOHN R. GRIST.

At this point adjourned till 9 o'clock to-morrow morning.

FRIDAY MORNING, *March 12th*, 1875.

CHARLES HIMROD, a witness called and sworn on the part of the defendant, as hereinafter certified, testified as follows:

1st Q. (By SANDERSON, sol. for def'ts.) State your name, age, and your present place of residence.
A. Charles Himrod; age, 32; residence, Youngstown, Ohio.
Q. State your present business and occupation.
A. Founder for Himrod Furnace Company.
Q. State how long you have been such, and how long altogether you have been in the furnace business in any capacity.
A. I have been a founder a little over 2 years; between 3 and 4 years before that was bookkeeper, and had general charge of financial affairs, making five or six years continuously. I have also been in employ of furnace companys before at different times.
Q. Please state where, aside from the Himrod Furnace Co.'s furnaces, you have been employed.
A. The 3 or 4 years just previous was for the Morgan Iron Co., Irondale, Ohio. I was, previously to that, but not immediately
150 previous, in the employ of Joseph H. Brown and Co., Moselle, Mo. I was also at Himrod Furnace Co. a few months, some years previous to this.
Q. State what is generally understood among furnacemen by the term furnace-runners, or trough-runners, and by the term furnace slag.
A. Slag is the impurities of the iron, fuel, and the flux. In casting, the last cinder that runs out is left in this *in* trough; this is properly a runner; but the name is usually applied to this when globules of iron are contained in it mechanically.
Q. State whether there is any iron ordinarily contained in the cinders or slag which does not form a part of the runners, so called; and, if so, in what form.
A. A mere trace usually of iron in the slag, seemingly chemically combined with the slag, as it cannot be detected by the eye.
Q. State whether, in order to reduce the iron, a mere trace of which you say exists in slag and cinders in the manner you have mentioned, it would be necessary or not to produce a chemical change in the slag or cinder to be operated on for that purpose.
A. I do not think you can separate it entirely, as the slag always carries out a trace of iron.
Q. State whether, in your judgment, it would be possible to make pig-iron or castings in any quantity from ordinary furnace slag
151 and cinders, either by means of blast-furnaces or foundry cupolas.
A. It would not.
Q. Please state your judgment as to the quantity of iron in any form there is contained in one ton of ordinary furnace slag or cinder.
A. There is from a mere trace to one-half of one per cent., which would be 10 pounds; 10 pounds would be a very large amount.

Q. State whether or not, in your judgment, a material containing that percentage of iron in any form could be profitably worked for the purpose of making pig-iron or castings, provided, in working it, it was necessary to smelt it by use of the ordinary fuels.

A. It would not be profitable.

Q. State now what material there is made by blast-furnaces, in the ordinary operation thereof, that can be resmelted, either by replacing them in the blast-furnaces, where made, or by the use of foundry cupolas, or furnaces built for the purpose, in order to make pig-iron or castings.

A. There is nothing but iron it would pay to put back. Sometimes it it is the shape of what is called scrap; sometimes is retained in the shape called runners, as before.

Q. State whether or not these runners of which you speak are either slag or cinder.

A. Not properly; but the iron is mixed with cinder or the cinder with the iron; it is a mechanical mixture of both.

Q. In the use of the ordinary ores in blast-furnaces, in the
152 making of pig-iron, state whether there is any chemical change or changes take place with the ores in the process of reduction through the stack of the furnace; and, if so, state what it is.

A. There is. The oxygen of the ores is removed, and iron is melted and earthy matters nearly all removed—not entirely, however.

Q. State whether, in resmelting iron, scrap-iron or furnace-runners, there is any chemical change takes place in that material, in the process of resmelting the same, in blast-furnaces.

A. No chemical change at all.

Q. What, then, is necessary or required in order to make pig-iron or castings from the ordinary trough-runners of blast-furnaces?

A. The iron must be melted, and the separation of the cinder can be done either in this melting or might be done by mechanical means before melting.

Q. What difference, then, is there, if any, in the process of resmelting in blast-furnaces—these trough-runners—and in resmelting the ordinary scrap-iron of blast-furnaces, and broken pigs, and parts of sows, broken up for that purpose?

A. No difference.

Q. Prior to October 1st, 1873, state whether you knew, and what you know, as to its being generally known among furnacemen that these trough-runners and scrap-iron could be resmelted in the ordinary
153 blast-furnaces and made into pig-iron by the application merely of sufficient heat for the purpose of melting the iron?

A. I knew it; and I think it was generally known previously to that time.

Q. State what difference in principle there would be, if any, in the process of resmelting these trough-rumers in an ordinary blast-furnace running on cold blast, with coke or charcoal as fuel, and resmelting the same material in the ordinary foundry cupolas, by the operation of cold blast and the same kind of fuel.

A. No difference.

Q. State whether on Oct. 1st, 1873, the operation of running blast-furnaces by means of cold blast was new or unknown.

A. It was not.

Q. State what knowledge you had prior to that time that such a thing had been done.

A. I knew by personal knowledge that a cold-blast furnace had been run 20 years before, and also had a general knowledge.

Q. Please state what knowledge you had, if any, as to the kind of fuel that had been used at such furnace or furnaces in connection with the cold blast prior to October 1st, 1873.

A. Charcoal, coke, and I think bituminous coal.

Q. And state also if you know what was used as fluxing material.

A. Limestone usually; sometimes clay in addition.

Q. What knowledge had you, if any, as to the use of furnace-
154 runners or scrap at the furnace or furnaces of which you speak, that were operated by cold blast?

A. Scrap always was used. I think that at this furnace I speak of they made no runners on account of the ores used.

Q. Suppose they had made runners, or had had them, what would then have been new or not generally known, if anything, in the process of resmelting them in such a furnace?

(Objected to by counsel for complainants.)

A. Nothing new.

Q. State whether or not you are familiar with the mode of construction of the ordinary foundry cupolas, and the ordinary manner of their operation.

A. Yes.

Q. For the purpose of smelting iron in a foundry cupola what is first done with the iron, if anything?

A. It is broken into pieces of suitable size to put into the cupola.

Q. State what is done with reference to the fuel; that is, how it is placed, above or below the first iron placed in the cupola.

A. It is placed below.

Q. And how, from that forward until the cupola is filled with material ready for ignition, is the material ordinarily placed?

A. They put in fuel and then iron, alternately in layers.

Q. What other mode or means, if any, would it be necessary to
155 adopt in foundry cupolas in order to smelt the ordinary trough-runners or scrap-iron from blast-furnaces?

A. No other.

Q. State whether or not these facts were known to you, and generally known, prior to Oct. 1st, 1873.

A. I knew it, and it was generally known around here; I think it was.

Q. For how long have you known, and how long has it been generally known to your knowledge, that foundry cupolas have been operated by cold blast?

A. Ever since I knew anything about foundrys.

Q. How long has it been known to you that the material ordinarily used in foundry cupolas was first broken up when first put into the cupolas?

A. I never knew them to do any other way.

Q. State whether or not prior to October 1st, 1873, you knew that the fuel and other material was ordinarily placed in foundry cupolas in the way you have above explained.

A. My knowledge about this matter is rather general. I have never been connected with foundrys, but am under the impression that I have seen foundries charged in that way before this period.

Q. State when, if ever, you commenced to resmelt the ordinary fur-

nace trough-runners in the blast furnace or furnaces with which you were connected.

A. When I first became a founder, a little over two years ago.

156 Q. State what knowledge you had previous to that time, and when it began, as to the use of these trough-runners for the purpose of resmelting.

A. During the period I spoke of being with the Morgan Furnace Company we occasionally used them, but not to any great extent. That is all the knowledge I have.

Q. State whether it was known to you, and what knowledge you had, as to its being generally known among furnace men, prior to October 1st, 1873, that these furnace trough-runners contained metal'ic iron.

A. All furnacemen I ever heard say anything about it knew there was metal'ic iron in them; I knew it also.

Q. State also whether or not you knew prior to that date, and whether or not it was generally known among furnacemen that these trough-runners could be resmelted and made into pig-iron by the operation merely of sufficient heat for the purpose of melting the iron.

A. I knew it; I think it was generally known by everybody that had any knowledge on the subject of iron-making.

Q. State whether or not the presence of iron in any form can be detected by the naked eye in the ordinary furnace slag and cinders.

A. No.

Q. State what difficulty there is on the part of an ordinary furnaceman in determining the existence of metal'ic iron in the ordinary

157 furnace trough-runners.

A. No difficulty.

Q. In the ordinary mode of resmelting these trough-runners in blast-furnaces are they mingled with ores or used alone?

A. There is ore and runners in the furnace at the same time, but in charging them I charge them separately.

Q. What difficulty, if any, would there be in running an ordinary blast-furnace on these runners or scrap, or both, without the intermingling of ores for the purpose of making pig-iron?

A. The lack of experience. No one has ever tried it in a blast-furnace that I know of. I think there would be no difficulty in doing it if a person knew the proper amount of fuel to use. The lack of experience would be the difficulty.

Q. Suppose you knew, either by experience or otherwise, the proper amount of fuel to be used in connection with these runners in a blast-furnace when running the furnace on them alone, and not in connection with ores, what else, in your judgment and opinion, would there be to prevent the making of pig-iron from them?

A. I know of no other difficulty.

Q. What aid, if any, in the resmelting of these runners in a blast-furnace is afforded by the ores used at the same time in the stack, either in producing a chemical change in the runners or otherwise?

158 A. There is no aid, although a small amount of iron in the runners melting and mixing with a large amount of different iron in the hearth would as'ume it its characteristics—that is, of the larger amount.

Q. Then the iron made from the runners, if less in amount, would assume the characteristics of the larger amount made from the ores?

A. That is my opinion.

Cross-examination:

Q. You have stated that your present employment is that of furnace-founder. What are the duties of that position?

A. I have charge of the details of the manufacture of the pig-iron—seeing that the charges are properly proportioned, properly charged, and that all the operations carried on are properly done; see that the casting is done at proper times, that the engines are running at the proper rate of speed, that the hot blast is of the right temperature.

Q. Have you ever been employed in a foundry where pig-metal is worked after being made?

A. No, sir.

Q. Have you ever been employed about a foundry cupola furnace?

A. No.

Q. Have you ever superintended the operation of charging, looking after the blast, the proper time for tapping the furnace, or any other of the duties of the operations connected with a cupola furnace?

159 A. No.

Q. Have you ever superintended or been connected with the practical working of a cold-blast furnace?

A. No.

Q. Then your entire practical experience in the production and working of iron has been in connection with the hot-blast furnace, in which bituminous coal or coke or both are used?

A. Yes.

Q. And that practical experience, I understand, has been for a little over 2 years. Is that correct?

A. Not strictly speaking. I had general charge of the Morgan Furnace Company for 3 or 4 years previously. I also worked at a furnace for a period of about 3 months, fireing hot blast.

Q. Have you ever used the material you have been calling furnace trough-runners in a a hot-blast furnace by itself—that is, without any ore being in the furnaces at the same time?

A. No.

Q. What proportions of ore and this material have been contained in the stack of the furnaces, highest and lowest?

A. The most I ever used was one-quarter, the other three-quarters being ½ ore and ½ rolling-mill cinder. The least I have ever used being from that down to none at all.

Q. Is there any difference in the working of mill-cinder and the working of ore, and the working of this mixture of slag and iron, called furnace-runners, in the hot-blast furnace in the way you have mentioned?

160 A. There is a difference. The ore and cinder must be oxidized and the earthy matters carried away by the use of a flux, and the runners are merely melted. The cinder that is with it will separate from the iron without the use of fluxes.

Q. Have you ever tried to melt the iron out of the slag of the trough-runners without the use of fluxes?

A. In charging in the furnace I put in the fluxes only required by the ore and cinder; none at all for the runners.

Q. When you charge with this material alone do you not use any fluxing material with it?

A. No.

Q. What is properly understood by furnace-foundrymen by the term runner; is it not that portion of the sand mould leading from the furnace to the pig-beds?

A. Yes; that is, as a runner, although they apply that term to the

cinder and mixed cinder and iron that comes out of the runner after casting, that chills or cools in the runner after casting.

Q. This cinder and mixed cinder and iron which you find in the runner, is it uniform as to appearance and density, or how do you find it?

A. No; it is not uniform; sometimes cinder light and porous, and sometimes nearly all iron, compact and heavy, and all grades between the two.

161 Q. Is it the same or a different material from the mill-cinder you have been testifying about?

A. Different.

Q. You have testified that all cinder or slag contains some iron chemically combined with it; do these runners contain this chemically-combined iron as well as the mechanically-mixed iron of which they are composed?

A. I testified that all cinder contains a trace of iron seemingly chemically combined; the cinder of these runners would undoubtedly contain this trace.

Q. Do these runners ever contain iron which is chemically combined with the cinder?

A. All cinder made when furnace is working very badly, being black and compact, contains protoxide of iron.

Q. What would you say to a process which consisted of pulverizing the cinder or slag with a stamp-mill and washing with water; would that, in your opinion, separate the iron from this cinder or slag?

A. No, I don't think it would from ordinary cinder.

Q. Then, in your opinion, the only way to separate iron from the cinder with which it is chemically combined is by smelting with fuel and fluxing material?

A. If it can be removed, that is the only way to remove it, ex-

162 cept in the elab'ratory of a chemist.

Q. In removing material from the trough-runners how do you discriminate as to what is valuable and what is without value for the purpose of resmelting?

A. By its appearance and weight.

Q. What disposition do you make of it?

A. Those that are considered valuable are put into the furnace, and the rest are thrown away with the cinder.

Q. You have stated that the cinder, other than the runner portion, contains but a trace of iron, not more than ½ of one per cent. What would you say to some cinders having been found containing more than 50 per cent.; would you consider that probable?

A. Yes, sir; in explination also I said cinder ordinarily contained not to exceed ½ of one per cent. Now, when a furnace is working badly it frequently contains more; sometimes the iron does not separate at all from the impurities or earthy matters the ore contains, and also unites with the earthy matters of the fuel and the limestone and leaves the furnace as slag, and in this case contains and probably would contain more than 50 per cent. of iron; everything leaves the furnace as cinder except what leaves the furnace as gas.

Q. Does, then, the furnace always work either good or bad; that is to say, is there no comparative degree in the case, is there no

163 variation between the condition you have last named and the first condition, as far as the result in the percentage of iron in the slag and iron is concerned?

A. There are all gradations; cinder may contain from a mere trace to 50 per cent. or more.

Q. Supposing it to contain 25 per cent. of iron, would it pay to work that over in a blast-furnace?

A. That would depend on the price of fuel and the price of pig-iron.

Q. If you concluded that it did not pay to work it, what disposition would you make of it?

A. Throw it away.

Q. Suppose it to contain from 40 to 50 per cent. of iron, what value would it have in comparison with the ore from which it was made?

A. If it contained fully 50 per cent. it would be worth, I think, about $\frac{1}{3}$ of the price of a ton of standard ore.

Q. In such case would you think it worth working over, or would you throw it away on the dump?

A. I would work it over.

Q. In working it over would you change the treatment of it, or would you treat it as fresh material?

A. I would not put any flux with it.

Q. Have you ever done this practically?

A. Yes, sir; once or twice, perhaps three times, but not very often, because we do not often make that kind of cinder.

164 Q. Suppose that this material which you could not work profitably in the blast-furnace could be worked in a cupola furnace, to extract the iron therefrom, in about the proportion of three bushels of coke to 8 hundred pounds of *of* the material and $\frac{1}{4}$ of a bushel of limestone, would you think it profitable to do so?

A. If you could extract the iron it would be profitable with material containing 15 per cent. or over of iron.

Q. Did you ever try this experiment in a cupola furnace?

A. No.

Q. You have stated in your direct examination that when you used furnace-runners in the blast-furnace you do not use fluxing material; is that correct?

A. I stated that I put in flux sufficient for the ores used, but nothing for the runners.

Q. When you charge the furnace with runners do you put in fluxing material at the same time?

A. Not in the charge with the runners. I make a charge of itself of the runners, and a charge of ore and limestone next.

Q. Is a flux necessary to reduce or extract the iron from the runner?

A. No, sir.

Q. Is a flux necessary when you use this cinder containing iron, about which you have been testifying?

165 A. No, sir; it is not necessary.

Q. Then you treat the two materials alike in the blast-furnace; is that correct?

A. I treat them alike, but the operation is different; that is, the blast-furnace does its work different.

Q. How do you know that?

A. The iron of the runner goes into the furnace in the shape of metal'ic iron; the cinder is a protoxide, combined with earthy matters; they both leave the furnace chemically the same; as they go in different and come out alike, the operation must be different.

Q. Then you judge from the result?

A. Judge from the fact that you take oxygen out of one and do not out of the other.

Q. Is there any oxidized material in the slag?

A. Yes, sir; selica, alumina, sulphur, lime, and sometimes phosphorous.

Q. Is there any oxidized iron in it?

A. In this black, unseparated cinder we have been speaking of before, the iron is nearly all in the shape of protoxide; the trace of iron I spoke of in ordinary cinder sometimes contains the sesquioxide.

Q. In your experience at the Morgan Iron Co. did they use up all the furnace-runners in the way you now use them?

A. No, sir.

Q. What did they do with them?

A. Built walls of them, threw them away, and used a few.

166 Q. Why did you not use them all?

A. Did not think it paid.

Q. In your experience at the furnace in Moselle did they use them or throw them away?

A. Don't think they ever made any.

Q. Do you know whether or not the runners made some years ago at the Himrod Furnace were built into walls and otherwise used instead of being resmelt*ing*?

A. I know that a large amount of them were.

Q. You have stated that you never were connected with or had practical experience in the operation of the foundry cupola; is that correct?

A. Yes; that I never had any connection is correct.

Q. You have also stated, I think, that you never had any experience with a cold-blast furnace; is that correct?

A. That is what I stated.

Q. How, then, do you arrive at the conclusion that there is no difference in the working of these different furnaces should this mixture of slag and iron be used in them?

A. The principle is the same, because there is but one thing to be done to the runners; that is to heat them hot enough to melt; there are no chemical reactions take place.

Q. Having no practical experience of it*h*, can you speak with certainty as to the result?

A. Yes; with a knowledge of what you start with and what you end with, you can tell what changes, if any, have taken place.

167 Q. You have stated that the iron made from the runners, if less in amount than the iron made from the ore in the same furnace, the former or smaller quantity would assume the characteristics of the latter or larger amount; is that correct?

A. I think so.

Q. Suppose that the amount of iron made from the runners was much greater than that made from the ore in the same furnace, would the metal made from the ore assume the characteristics of the metal made from the runners?

A. I should think so.

Q. Suppose the amount of metal made from each of the materials to be equal, what would be the characteristics of the metal produced; how would one effect the other?

A. I should suppose they would have an equal effect on each other.

Q. Supposing the metal in the runners to be different from that produced from the ore, and that they effected each other equally, what kind of metal would you produce?

A. It would depend on what these differences consisted in.

Q. Would it be uniform?

A. Undoubtedly.

Q. Would it be the same or different from metal produced entirely from ore?

A. It would be the same if the runners were made entirely from ore.

168 (Question repeated with reference to questions immediately previous refer'ing to the case of the iron from the ore and the iron from the runners being of different quality.)

A. If the difference consisted in one being grey and the other being white iron, the product would be as good as though all made from ores. If, however, the runners contained matters injurious to iron, such as sulphur or phosphorous, the product would not be as good as though made from our pure ores.

Q. Supposing the metal extracted from the runner to be different from the metal extracted from the ore, and these two different metals combined into one uniform metal, would it be the same as the metal made from the ore alone?

A. If the difference consists in some mechanical structure or amount of carbon contained in the iron, and iron resulting from the ore, the iron would be the same as though made from all ore; if, however, the runners contained some chemical matters impossible to remove, they would remain in the mixture, and the iron must necessarily be different.

Q. Then, in your opinion, it depends upon the quality or nature of the metal in the runners whether the combined result of its admixture with the metal from the ore makes any difference in the combined metal; is that how you wish to be understood?

A. Yes, sir;

Q. Then the smelting of the furnace-runners with the ore may produce a different metal than that produced by either of these ma-

169 terials used singly; is that your opinion?

A. Yes, sir; it is.

Q. Will it vary according to the different proportions used?

A. If it varies at all, it will, I suppose.

Q. Do you know the old Clay Furnace, Mercer County, Pennsylvania?

A. I lived there when I was a boy.

Q. Can you state whether or not furnace-runners were used or thrown away at that furnace?

A. I don't know anything about it.

Q. You state that you know that trough-runners and scrap from blast-furnaces can be used in the same way as iron itself is used in a foundry cupola having no experience in the practical operation of a foundry cupola, why do you say you know this fact?

A. Because scrap-iron, pig-iron, and the iron in runners are chemically the same, the difference between them being in their shape and size and form. I also know of foundries using scrap entirely in making castings, and have seen them smelt runners and draw the iron off the same as blast furnaces do pig.

Q. Where did you see this done?

A. Homer Hamilton & Co.'s, defendants in this suit.

Q. Did you see them charging the furnace?

A. I did.

Q. Please describe how it was done.

A. I never was there when they commenced; their machine was in operation, and they were throwing in the runners and fuel, and I

170 think some lime; I won't be positive about it.

Re-examination:

Q. State when it was that you first saw the defendants, Homer Hamilton and Co., using furnace-runners in their foundry cupola.

A. It was in 1878; and my recollection now is that it was in May or

June; cannot speak positively, but think in the spring or summer of 1873.

Q. State what you remember now as to whether or not it was prior to October 1st, 1873.

A. I am very certain that it was before the first of October, 1873.

Q. State how you came to be at their establishment at the time you have mentioned in your cross-examination, when you say you saw them using runners in the cupola, and what directed your attention to that fact.

A. I don't remember what called me there, but what first called my attention to the fact that they were using them was seeing a man wheeling them in and hoisting them up to charge them.

Q. What inquiries, if any, did you make at that time from either of the defendants, or any of their workmen, as to the use of the runners in their cupola, and, if you made any, what information did you receive?

A. I inquired of Homer Hamilton what use he was going to make of the runners he was melting in his cupola. I think his reply was
171 pig-iron is high, and he thought he would make his own.

Q. State what conversation you had, if any, with Homer Hamilton, or either of the defendants, at that time, or at any time prior to October 1st, 1873, concerning the utilizing of furnace-runners by smelting them in the cupola of their foundry.

A. I had several talks with Homer Hamilton as early as March or April, 1873, in regard to using runners, but no talk as to how he proposed to use them until this time I speak of seeing him melt them; then he told me that was his views and had been in regard to using them, and also stated that he liked what he had done and proposed to keep on.

Q. State whether or not, prior to October 1st, 1873, you had knowledge that the defendants were using furnace-runners from blast-furnaces in this cupola of their foundry for the purpose of making pig-iron and castings, or either.

A. I had the knowledge I have just been speaking of; this was prior to October 1st, 1873.

Q. State what you know, if anything, as to the defendants purchasing any of the runners prior to October 1st, 1873, for use at their foundry.

A. I know that they contracted for some at the Himrod Furnace in the spring of 1873, but do know that they got any at that time.

Q. At or about the time of the purchase did you learn in any way what use they intended to make of them, and, if you did, state
172 what you learned, and how?

A. I learned that they proposed to make castings or pig-iron of them ultimately, but nothing as to the process they proposed to use. I learned this from Homer Hamilton.

Q. State what you heard from him, if anything, as to when they were to be used.

A. The conversation was held at the furnace of the Himrod Furnace Company. We walked through the furnaces and out into the cinder pile, and also up to the office. There were present, while at the office, Mr. Cornell, and, during the whole of the talk, some man who came with Homer Hamilton. I think now this man must have been Mr. Gerwig, one of the defendants, but I cannot speak positively as to who it was. I think it was Mr. Gerwig, but I will not be sure.

Q. How far are the furnaces of the Himrod Company from the foundry of Homer Hamilton and Co.?

A. If they had moved from their old place of casting to their new place, it is about ½ of a mile.

Q. Who' did you next converse with Mr. Hamilton on this subject?

A. I remember having several conversations with him between that time and the time I saw them melting them, but I cannot remember any definite time, but they could not have been more than a few weeks apart.

Q. Where did you see them melting the slag?

A. At Homer Hamilton and Co.'s foundry, at the foot of Market street.

Q. Is that the new or old foundry?

173 A. The new.

Q. How long had they been there before this took place?

A. Don't know.

Q. Had they been six months?

A. I don't think they had over 3 or 4; but my knowledge of that matter is very indefinite.

Q, Could you say positively that they had not been 6 months there?

A. No, sir.

Q. Could you say positively that they had not been 9 months there?

A. I could not tell, although I feel as certain as about anything of which I have no absolute knowledge.

Q. Can you say definitely when you did see this experiment made?

A. No.

Q. Do you remember the firemen's parade that occurred in this city that year?

A. I have no recollection of any fireman's parade that I can say occurred in that year.

Q. Do you remember of any fireman's parade having occurred?

A. I do.

Q. When did they occur?

A. I have no recollection of the times.

Q. Do you remember any event of a public nature by which you can fix this date?

A. I think the failure of Jay Cook occurred in August or September, 1873. We stopped our furnace on account of the panic in September, 1873.

Q. Can you fix the date by that thing?

A. It was previous to that.

174 Q. How do you know it was previous to that?

A. I remember our furnace was in blast at the time, and remember of talking with one of our employees about it, who has not been in the employ of the company since.

Q. What was the name of that employee?

A. Cornelius O'Donnell.

Q. What was the nature of the contract made between Homer Hamilton and Co. and Himrod Furnace in regard to this material?

A. The contract was made with Mr. Cornell. My recollection of it is Mr. Hamilton was to have a certain amount, not to exceed 50 tons, wherever he could find them on the cinder dump, for nothing; then, whateve' we made that I thought were not worth putting into the furnace he was to pay a specified price for, if he wanted them. This was the talk in regard to the contract. The contract was made with Mr. Cornell, and may vary from this.

Q. Was the contract a verbal or written one?
A. Verbal, I think.
Q. Was any of the material delivered on that contract?
A. He picked up from the cinder piles some amount, I don't know how much, but never took any away from the furnaces.
Q. When did he take this from the cinder pile?
A. I think he was hauling occasionally a load during the spring and summer of 1873.
Q. Can you state more definitely?
A. No; for he was 2, or 3, or 4 months getting what he did.
175 Q. Was this the material you saw him use in the cupola furnace?
A. I can't say it was the same material, but it was the same kind.
Q. Was that the first trial of it you saw?
A. I don't know.
Q. Did he say he had tried it before that?
A. My recollection on this point is very indistinct, but I am a little inclined to think he stated he had tried it before.
Q. Was there much of the material around the cupola when you saw this trial being made?
A. My recollection is that there was 40 or 50 tons.
Q. Did he say where he got it?
A. No.
Q. You asked him what he was doing with it, did you not?
A. Words to that effect.
Q. Why did you ask him the question?
A. Because it was new to me, his using it in that shape.
Q. Did you see any pig-iron or castings made from it at that time in or about the foundry?
A. I saw pig-iron.
Q. How much of it?
A. I don't think I saw over 3 or 4 tons.
Q. Can you walk through a furnace after it has blown out?
A. If the stock is taken out of the furnace-stack you can walk through.
Q. Can you walk through a furnace when it is in blast?
176 A. You can walk through the furnace, but not through the furnace-stack. The furnace-stack is but a part of the furnace.

At this point adjourned till 9 o'clock to-morrow morning.

SATURDAY, *March 13th*, 1875.

Witness desires to correct a statement made yesterday, having since examined data from which he can give an exact statement:

I stated that we stopped our furnace in September, 1873, but the exact date was October 23rd, 1873. I find Homer Hamilton & Co. charged on the books of the Himrod Furnace Company, in August, 1873, with a quantity of runners. I wish to state further that this fact convinces me that he hauled the quantity I stated in evidence yesterday he was to have for nothing during the 3 or 4 months preceeding. The impression would also follow on my mind, from what I know, that the runners I saw him melting was before he commenced buying.

Q. Can you state definitely or with certainty when you left the employment of the Morgan Iron Co.?
A. It was sometime in January, 1873, is my recollection. I think

the Morgan Furnace Company's lease of the furnace expired Jan. 20th, 1873.

Q. Can you state when you began to superintend the foundry work of the Himrod Furnaces?

A. Either the 10th or 20th of February, 1873.

Q. How long have you known Homer Hamilton?

177 A. From sometime in March, 1873, although I had seen him sometime before that.

Q. You stated in your recross-examination that you had several conversations with Mr. Hamilton about the subject of making iron from these runners; when did the first conversation take place?

A. My recollection is in March or April, 1873.

Q. Can you state the substance of that conversation?

A. The substance was, as I remember it was, that Mr. Hamilton had made certain arrangements with Mr. Cornell to get from the Himrod Furnace Company a quantity of runners under conditions stated in my evidence yesterday. He wanted me to show him about what I thought worth saving for the furnace, and what I would consider as belonging to him under the contract.

Q. Did he say what he was going to do with the material?

A. I can't say that he did directly, but the impression was left on my mind that he expected to use them to make castings or pig-iron.

Q. Did you ever hear of any one purchasing such material before for this or any other purpose?

A. No.

Q. Did you ask him what he was going to do with it at that time?

A. Don't remember that I did.

Q. When did you next see him and have a conversation with him?

A. I cannot tell the exact time.

Q. To the best of your recollection, when was it?

178 A. I think I saw him as often as once every week or 10 days.

Q. Did you converse with him on this subject?

A. I did sometimes; don't know as I did every time.

Q. What was the purport of these subsequent conversations you had with him?

A. That he thought it was practicable to use them some way better than in a blast-furnace, and he was going to try it.

Q. Did he say how he was going to use them?

A. Not until I saw him using them in a cupola.

Q. Do you mean to say that in all the conversations you had with Mr. Hamilton, from the time you first had conversation with him until the time you saw them casting pig-iron from the cupola, that he never told you how he intended to make the iron from them?

A. Yes.

Q. And that you never asked him?

A. Don't think I ever asked him.

Q. Was the first conversation you had with him about these the first time you had seen him and conversed with him?

A. Do not think it was, but among the first.

Q. How long had you known him before this conversation about the slag?

A. I think only a few weeks.

Q. How were they casting this when you saw them?

A. Tapping it out of the bottom of their cupola into a big pot, and pouring it into a pig-bed.

Q. Describe this operation; I don't understand it.

179 A. The operation—tapping—you understand, the pot was a large pot, probably holding a ton; this was lifted around by a crane to the proper place, and poured out by two men, by the use of handles fastened on to each side of the pot. This is from recollection, and may vary from the exact facts.

Q. Can you state positively when you saw this operation done?

A. I cannot.

CHAS. HIMROD.

Also, THOMAS W. KENNEDY, a witness called and sworn on the part of the defendant, as hereinafter certified, testified as follows:

Q. (By SANDERSON, solicitor for defendants.) State your name; age, and your present place of occupation.

A. Thomas W. Kennedy; age 50 years, past; reside in Poland township, Mahoning County, Ohio.

Q. State whether you have been engaged in any capacity in the manufacture of pig-iron; and, if so, in what capacity, at what place or places, and how long at each place.

A. I have been, in the capacity of furnace-builder, at a number of places. First place I was engaged was at the Eagle Furnace, at Youngstown, Ohio; was there probably 11 months. At the Phenix Furnace, same place, when it was building; there probably 4 months. Next at the Wheatland; was there when the furnace was built; there from April to New Year's. Next with James Westerman and Co.,
180 Sharon, with them about 15 months. Next at Wheatland again; was hired for a year, but did not stay but about 11 months. Next with Andrews and Brothers, down at Hazelton, Ohio; there 16 months, as near as I can tell. Next Sharpsburgh, Pa.; about 15 months, as near as I can tell now. Next at Struthers; there since 1st of April, 1869.

Q. State what experience, if any, you have had in the actual management of the manufacture of pig-iron at blast-furnaces, and for how long a time.

A. Since the year 1854 I have been in connection with furnace building, during all that time, since I have had an opportunity of being conversant with the manufacture of iron. Since the year 1860 the manufacture of iron, or business connected therewith, has been my exclusive business.

Q. Who has had the actual management and superintendance of the manufacture of pig-iron at the Struthers Iron Company's furnace since that business commenced there?

A. I have had control and management of the furnace.

Q. At what time did you commence to operate that furnace?

A. In the fall of 1869.

Q. State what knowledge you have, if any, and when you first acquired the same, as to the existance of metal'ic iron in what are commonly called trough-runners of blast-furnaces.

A. I had knowledge that trough-runners had metal'ic iron in them, and have known that since 1863.

181 Q. What knowledge did you have, and since what time, that this material commonly called trough-runners of blast-furnaces could be utilized by re-smelting the same in blast-furnaces or otherwise?

A. I knew that they were melted since 1863 in blast-furnaces. I knew that they had been smelted in cupolas since 1872.

Q. State what is ordinarily understood among iron manufacturers by

the term trough-runners, or furnace-runners, and also what is ordinarily understood by the term slag, or furnace-slag.

A. Trough-runners or furnace-runners are accumulated in the trough after the casting in a furnace; also runners that sometimes accumulate in chills or moulds, the last coming out of the cast, which the man that skims or strains the iron cannot tell from the other by the color. Furnacemen understand slag, or furnace-slag, to be the excrement that is thrown out of the tapping-hole we tap for cinder.

Q. State in what form the iron is contained in the trough-runners you have described.

A. When a furnace is running badly it is sometimes in the shape of white iron mixed with cinder. When the furnace is running on grey, highly-carbonized iron, it usually takes the form of globules or shot-iron, cemented together with grey cinder, with a portion of pure iron at the bottom of the trough.

Q. State whether in the instance you have first given in the
182 above answer, when the furnace is working badly, the iron in the runner is in the metal'ic form or in a chemical combination with other substances.

A. When the iron is white it is metal'ic iron; if mixed with unseparated material it would be in a different form; it would probably need some chemical process to bring it to metal'ic iron.

Q. When from any cause the material in the furnace-stack fails to perform its office, and in a melted form, but in an unseparated condition, is permitted to run from the stack, what is it called?

A. In furnace phrase we call it bull-dog cinder.

Q. What disposition is ordinarily made of it at blast-furnaces?

A. I think most men pile it away and put it through the furnace again.

Q. State whether or not among furnacemen it is denominated slag or refuse from a blast-furnace.

A. No; I think not. I think it is preserved as stock and run through the furnace again.

Q. State what chemical change, if any, takes place in the furnace-stack in the process of resmelting ordinary trough-runners in order to make pig-iron.

A. I don't think there is any chemical process.

Q. State what more, if anything, is necessary or required for that purpose than an application of sufficiont heat to melt the material.

183 A. I don't think there is anything else required.

Q. Suppose it were possible to apply sufficient heat to a quantity of this material in the cupola of an ordinary foundry, or in any other construction where the iron contained in the material would have an opportunity to sink below the other material of slag or pass off, what would be the result?

A. It would be cast-iron in a purer state than it was with the slag with it.

Q. Suppose a quantity of this material was placed in a mass of molten iron, either in the sand bed of the casting-house of a furnace or elsewhere, and the mass of this material was not so large but that it would become melted by the contact, what would be the result so far as the material of the runner is concerned?

A. It would unite with the other iron, and the slag would probably come to the top.

Q. State whether or not the slag, if it had an opportunity in that

melted condition, would run off from the iron with which it had previously been mixed.

A. It would undoubtedly separate from it and come to the top and run off if it could.

Q. State whether or not in your own operations in conducting the manufacture of pig-iron at the blast-furnaces with which you have been connected you have made any use for the purpose of manufacturing pig-iron of this material commonly known as trough-runners.

184 A. We have, in the furnace which I now have charge of, not only smelting our own, but bought them from other furnaces and smelted them. We have used all our own up with the exception of a few we have in the yard and what we have sold to the foundry. We have only sold to one foundry, the Co-operative Stove Foundry, located at Beaver Falls, Pennsylvania.

Q. Please state, as nearly as you can, about the time you first knew of the use of furnace-runners for purposes of resmelting in blast-furnaces, and also state about the time you personally began to use them.

A. In 1864, when I was at Wheatland, I saw them selected by the furnacemen there and taken back and used. I commenced using them at our own furnace shortly after we blowed in; don't know whether we used any in 1869, but we did in 1870.

Q. Since you commenced using them at your furnace, state whether or not you have either used yourself, at your furnace, or sold to be used elsewhere, substantially all that you made excepting those you speak of as having saved for future use, and state also whether or not you have thrown any portion of these made in the slag or refuse pile of the furnace.

A. We have been as careful as we could. There may have some pieces gone over occasionally, but not intentionally. We tried to serve them as carefully as we did pig-iron.

185 Q. State whether or not you are familiar with the mode of construction and process of operation of the ordinary foundry cupolas.

A. I have a general knowledge of their mode of construction; built one once and operated it awhile.

Q. State what knowledge, if any, you had prior to October 1st, 1873, as to the use and application of cold blast for the purpose of operating blast-furnaces.

A. I had no knowledge except what I got from books.

Q. Did you receive information upon that subject from books or other publications; and state if you knew, in that way or otherwise, that blast-furnaces had been run by the application of cold blast prior to the time mentioned?

A. I knew it as well as anything that a man learns by *by* reading or conversation.

Q. State what you knew, if anything, at the same time, and prior to October 1st, 1873, as to the use of charcoal or coke as fuel to be used in blast-furnaces.

A. I knew that they were both used, and had seen them both used.

Q. State what was the ordinary material ordinarily used in all kinds of blast-furnaces prior to said date as fluxing material.

A. Limestone. Have seen a species of blue clay used, have never seen it analized; supposed it was aluming; have seen some marble used at Lake Superior.

Q. What is scale or black oxide of iron?

186 A. Scale as referred to, iron such as referred to, now comes of iron in a rolling-mill; mill-cinders are a species of black oxide.

Q. Explain the mode in which the ordinary foundry cupola is constructed as to shape, material, and dimensions.

A. They are built on metal columns, with stone or metal base; at the top of the columns there is a ring put on with a drop-bottom; generally from that ring for 6 or 8 feet high with outside brick or stone; the outside casing from there up with iron casting, lined with fire-brick or other material that will stand heat, with a door or doors for charging; 10 or 12 feet or more from the ring to the charging-door; the immediate bottom above the ring is formed in the shape of a crucible, put in of good fire material, or fire-brick, with boshes immediately above crucible extending up from one to three feet above the crucible; then lined from that point 4 feet above the filling-doors with fire-brick, with a smaller chimney than the cupola extending up far enough for safety to the building, with a fixture at the base for blowing air into the cupola, with two or more openings from blowing-connections to the cupola. Cupolas vary in size, from probably 2½ feet to 3½ feet on the inside at the bottom; will be larger at the filling-door in proportion.

187 Q. Please explain the difference between the construction of an ordinary foundry cupola on the inside and the inside of an ordinary blast-furnace.

A. The difference in construction consists that in an ordinary blast-furnace the walls incline from top of boshes to top, making top of furnace less than it is at the boshes, whilst the walls of a cupola from the back to the filling-doors are vertical.

Q. State what differences there are, if any, in the actual process of the smelting of material, leaving out of view any chemical changes which may take place in an ordinary foundry cupola and an ordinary blast-furnace, assuming that both are being operated by means of cold blast.

A. There would be no difference in the operations.

Q. What difference, if any, would there be in principle?

A. Leaving out of view any chemical change, there would be no difference.

Q. State what difference, if any, either in process or principle, there would be in the cases above supposed, supposing the blast-furnace was being run by means of hot blast instead of cold blast, excepting the additional quantity of heat that would be afforded by the heated air?

A. The process of smelting would be the same; the principle involved would be the same; it would require less fuel.

188 Q. You have already stated that in smelting furnace-runners in blast-furnaces no chemical change takes place in the material. What do you say as to any chemical change taking place in smelting them in a cupola furnace?

A. If runners were smelted in a cupola, there would be no more chemical change than in smelting pig-iron therein.

Q. How would it be in smelting the same material in a blast-furnace?

A. There would be no more chemical change than in smelting pig-iron in a blast-furnace.

Q. What has the hot blast of a furnace, that is, the fact that the air is heated before being blown into the furnace, to do with reference to producing any chemical change in the ores or other material, excepting so far as the application of heat aids in producing such change?

A. It has no effect on the chemical process, except as stated in question.

Q. State what difference there is, if any, in your judgment, between

the operation and effect of cold blast and hot blast in producing results in a furnace or cupola, leaving out of view the additional smelting force afforded by the hot blast.

A. I don't know of any.

Q. In the use of furnace-runners at your furnace did you use them alone or in connection with ores?

A. We used them in the furnace in connection with ores, that is, they were smelted while ores were being smelted.

Q. While you were using runners in the stack, state whether
189 you increased or otherwise changed the quantity of fluxing material used.

A. We generally used them without any fluxing material being calculated for the runners, but when using them in large quantities, without having the light cinder which adheres to them being knocked off, we had to use less fluxing material on our ores.

Q. What would you say then as to the necessity in the ordinary smelting of these runners alone in using any fluxing material whatever?

A. I don't think they need any.

Q. Please explain the method ordinarily pursued of forming and making up the burden of a cupola when using pig-iron in order to make castings.

A. Generally put in a bed of coke first, then we commenced throwing in some pig-iron, sometimes a little limestone with it, and shovel on another bed of coke, and scatter on a little pig-iron again, and continue so till we get filled up as full as we want the cupola. Then we fire it below when the fire has sufficiently worked through the coke we put on the blast, and as it melts down we continue putting on alternate layers of coke and pig-iron, as much as we want put on that heat.

Q. What change in the above process would be necessary, if any, if scrap-iron were used instead of pig-iron?

A. I don't think there would be need of any change.

Q. What change, if any, would be necessary in the process of making up the burden of the cupola if furnace trough-runners were used instead of scrap or pig iron, and what other material, if any material, would it be necessary to use in addition to those named in order
190 to run the iron after being melted into either castings or pig-iron?

A. It would not need any change. I think it would run better without any additional flux or lime.

Q. Would it be necessary in the last-supposed case, in your judgment, to use any scrap or other oxidized iron, or scale, or black oxide of iron, in connection with the runners, in order to make the runners into pig-iron through the cupola?

A. No, I think not; I think the black oxide of iron would be a great injury to it.

At this point adjourned till half past one o'clock (1.30), Monday afternoon.

MONDAY, *March 15th*, 1875.

Q. Please explain in what manner, in your judgment, the oxidized iron would be an injury in the process refered to.

A. I think it would make the pig-iron the produced harder, and not as soft quality as though produced without it.

Q. State whether in your judgment, the fact of that effect of the oxide of iron would ordinarily prevent its use in the reduction of furnace-runners to pig-iron in foundry cupolas.

A. I think it would.

Q. Are you acquainted with the ordinary construction of blacksmith's forges and the implements or machinery used for heating the iron used by them?

A. Yes, I am.

191 Q. State what there is, if anything, necessary or ordinarially used in order to make pig-iron through foundry cupolas in the way you have previously mentioned that is not also used by blacksmiths in heating their iron, leaving out of view any difference there may be in the fuel used and the mechanical contrivances for the formation of the blast, and leaving out of view also the difference there may be between a foundry cupola and a blacksmith's forge in mode of construction.

A. Heat sufficient can be produced in a blacksmith's forge to melts pig-iron, but in a blacksmith's forge the heat is produced at the bottom of the forge, and there would be no place for the iron to accumulate; as far as producing the heat for that purpose, there is no difference between the blacksmith-forge and the cupola.

Q. Assuming that it was generally known that furnace-runners contained metal'ic iron, that they could be smelted by the application of cold blast, with coke or charcoal as fuel, in blast-furnaces, that no chemical change took place in the material in their smelting, that if when smelted they were run into pig-beds in the form of pig-iron, that in the smelting of them as above mentioned it did not require any fluxing material so far as they were concerned, and that it was not necessary to mingle with them in the furnace-stack any scrap or oxidized iron, or scale or black oxide of iron, what was there new, and not generally known among iron manufactures on and prior to October 1st, 1873, in the process of manufacturing pig-iron from furnace-runners, either in

192 blast-furnaces or by means of foundry cupolas, by making up the burden of the cupola with coke, broken up furnace-runners, and then coke and furnace-runners alternately, until the burden was completed, and then effecting the smelting by the application of cold blast?

(Objected to by counsel for complainants.)

A. I know of no new principle involved in the operation.

Q. State what is meant and understood by a skimmer as used by furnacemen, and how it is used, and for what purpose.

A. A skimmer is a plate of iron set edgewise, edge down across the runner, driven down by the keeper or helper whilst casting at the furnace low enough to abstract or skim the slag from the iron, the iron passing into the pig-beds underneath the skimmer, while the slag runs out another way.

Q. State whether or not, in some conditions of the furnace, notwithstanding the use of the skimmer as above mentioned, quantities of slag pass under it and become connected with the pigs in their process of formation in the pig-beds.

A. Yes; it does, frequently.

Q. State under what circumstances this occurs.

A. It occurs when the furnace is very greasy, that is, when working very greasy iron and grey slag; the cinder at that stage, and while so passing under the skimmer, is difficult to distinguish from the iron passing with it.

Q. What difficulty is there, if any, in determining the fact that iron and slag both together had passed under the skimmer, under such cir-

cumstances, after the formation and cooling of the pig in the pig-
193 bed, and what is the relative position of the slag with reference to the iron?

A. No difficulty in determining it; it shows itself after it cools, and sometimes before. The slag floats to the top and hardens there.

Q. In what respect, if any, does a mass of iron and slag thus formed differ from the slag and iron of the trough-runners, excepting in the proportion of slag to iron?

A. There is no difference.

Q. What use is ordinarily made of those pigs thus formed which contain, or have adhering to them, so large a quantity of slag as to render them not workable in puddling-furnaces?

(Objected to by counsel for complainants.)

A. They are generally worked through the furnace again as scrap, or sold to foundrymen.

Q. State what knowledge you have, if any, as to pigs of that character having been sold to and used by foundrymen in their cupolas prior to March 1st, 1873.

A. We have sold those to both of the foundries here in Youngstown, and other foundries, prior to said date. They are generally considered highly carbonized iron. I have sold them to them for that purpose. I suppose that they used them, but I did not see them use them.

Q. Please state how long ago it was, as nearly as you can now remember, when you first sold pigs of this character to the defendants.

A. I think the latter part of 1870 or fore part of 1871.

Q. State whether or not as early at that you sold the same kind of pig-iron to other foundrymen.

194 A. Yes, I think so.

Q. State what other mode, to your knowledge, the defendants had in 1870, and since that time, of using pig-iron of that character excepting in their cupola.

(Objected to by counsel for complaiants.)

A. No other mode to my knowledge.

Q. State what difference, if any, either in process, principle, or appliances, there would be in the use of pig-iron of this character in a foundry cupola and the use of the ordinary furnace trough-runners, either for the purpose of making pig-iron or castings.

A. I don't think there would be any difference.

Q. State as nearly as you can at what time you first knew, if ever, that furnace trough-runners were being used by foundrymen for the purposes of resmelting in their cupolas.

(Witness here refers to memoranda in his possession.)

A. The first knowledge was April 19th, 1872.

Q. State how you acquired the knowledge at that time.

A. I shipped 900 pounds of it to the Co-operative Stove Foundry Association at Beaver Falls, Beaver Co., Pennsylvania, asking them to run it through their foundry and report the percentage of iron. They did report they had run it through and how much iron it made. Immediately after that shipped them 10 tons of runners, and went down and saw them using it with a mixture of foundry-iron in order to make stove-plates; have sold them since that time—since the first shipment—something over 150 tons of the same material for the same purpose.

195 Q. State as nearly as you can when it was that you say you was present and saw the material used as above stated.

A. It was probably in April or May, 1872.

Q. State in what it was the company you have referred to smelted the runners at the time you were present.

A. It was in their foundry cupola.

Q. State whether or not the cupola you speak of was one of an ordinary kind then in ordinary use.

A. It was; had one little appliance which I recom'ended them to do. They had a hole between the tuyers at the back of the cupola to tap off the slag.

Q. State whether any other persons were present at the time you saw this material operated with, and, if so, state how many and the names of those who were known to you.

A. There was probably all the moulders there—probably 20. I did not count them. Mr. Sennate, their foreman, Mr. Saisley, their secretary, was there, and some others I cannot name.

Q. State whether or not it was known to those who were present that trough-runners were being used at the time, as you have stated.

(Objected to by counsel for complainants.)

A. I think it was known to all the men in the co-operative association. I talked with a number of the moulders and asked them if there was any change in the iron while they were using them.

Q. What do you know as to the moulders of whom you speak being members of the association?

A. I don't know anything but what they told me. They told
196 me they were all members of the association that I talked with.

Q. State particularly where the foundry to which you refer was located.

A. It was in Beaver Falls, Beaver County, Pa.

Q. State what effort was made, if any, at the time you speak of, when you were present, by any one to conceal what was being done, and state also what difficulty there was for any one who had desired it to be present and to see and know what was being done.

(Objected to by counsel for complainant.)

A. There was no effort made that I saw to conceal the matter. There was no difficulty that I know of; there was no obstruction placed in the way.

Q. State what means or appliances, if any, were used or provided in order to exclude the public from the foundry, or that would have the effect to exclude the public therefrom, at the time you were present as above stated.

A. There was nothing of the kind that I know of.

Q. Please state all the conversation particularly that led to your shipment of a quantity of this material in the first instance to the foundry at Beaver Falls to be operated upon there, and what you did or said, either at that time or previously, to members of that association or to anybody else, concerning the practicability of using furnace trough-runners in foundry cupolas.

A. I had spoken to Homer Hamilton to melt some of the runners before that, and he had told me he was very thronged with other busi-
197 ness, and he wouldn't have his foundry spoilt or destroyed with it at that time, but he might at some future time. I then spoke to Mr. Sennate; told him I had been buying of that material to run through my furnace; requested him to permit me to ship him some, and he would try it and let me know what percentage of iron was in it. He consented to do it on condition I would sell him runners if they worked satisfactorily in his foundry, so he could cheapen his stove-

plates, as iron was high at that time. Consequently I shipped him the runners, about 900 pounds, as I said before, for trial.

Q. State as nearly as you can when it was that you spoke to Homer Hamilton about this matter to which you have refer'ed above.

A. It was probably in the last of the year 1871 or first of 1872.

Q. State what opinion or judgment, if any, you gave to either Hamilton or Sennate at the time you speak of as to the practicability of using the furnace-runners in their cupolas. State what you said to them upon that subject.

A. I told them both I had been running them successfully through my furnace. I think I took a hammer and knocked some of them apart and showed them they were simply shot-iron cemented together by grey cinder, and gave them my opinion that they would certainly work well in a cupola.

Q. Had you had prior to that time any conversation with others, especially with Thomas Struthers, on the same subject? And, if so, state what was said.

198 (Objected to as leading by counsel for complainant.)

A. Oh, I expect I have talked to a number of men about the runners; think I had bought some runners from John Grist, from the Brown Iron Company; also talked with James Westerman about buying his early in the spring of 1872. I also mentioned to Mr. Struthers that we ought to take out a patent for smelting them. He said unless we could get up some new way of extracting the iron that it wouldn't be patentable; that was the conclusion we came to after talking the matter over.

(So much of above conversation as refers to Mr. Struthers objected to by counsel for complainants.)

Q. State as nearly as you can the number of tons of this material you purchased from others prior to Oct. 1st, 1873.

A. We bought for Struthers Iron Company (witness here refers to written memoranda) from April 8th, 1872, to May 4th, 1872. We received 87 and $\frac{845}{2240}$ tons from Beaver Iron Company since that time. Before the date you mentioned I made a contract for all the runners Jonathan Warner had on hand in his furnace-yard, all he could conveniently gather up on the road around his furnace, and all he could make during the year 1873. That contract was dated August 18th, 1873.

Q. Now please state the quantity of these runners you have sold to foundrymen prior to Oct. 1st, 1873.

A. I have no memorandum; I can't tell. My best judgment would be about 100 tons.

199 Q. State when you first knew, if you were ever informed, that the plaintiffs, or any of them, or any one else, claimed to have letters patent for the use of these trough-runners in any way, or for any process in using them.

A. I could refer to a letter, if I have it in my pocket, when I first saw Mr. McCallum here. I have not the letter, but think it was about July, 1874, at the time Mr. McCallum was here.

Q. I do not remember if I asked you, and I do now, whether you are a member of the Struthers Iron Company?

A. I am.

Cross-examination:

1. Q. (By Mr. McCALLUM, counsel for complainants.) How long have you been actually employed in superintending the making of iron in blast furnaces, stating place where you have been so employed?

A. As founder and superintendent at Struthers Iron Company's works, since our furnace started in 1869.

Q. Have you ever been employed superintending the operations of a foundry where pig-iron is worked after being made?

A. I have been.

Q. State when and where you have had this experience.

A. It was in 1868, at Sharpsburg, Pa.

Q. Is this where you built the cupola to which you refer'ed in your direct examination?

A. Yes.

Q. State if that cupola was built in the form and manner you have described as the general form of a cupola furnace in your direct examination.

200 A. Yes.

Q. Did you ever see the slag of the trough-runner, or material forming in the trough-runners of a blast-furnace, smelted in that cupola furnace which you constructed?

A. No, sir; I never did see any smelted in that cupola.

Q. State, if you can, what circumstances or how your attention was first directed to the fact that iron was contained in the slag of the trough-runners.

A. I don't know that I can give you the first circumstance. I have talked with founders, and seen some of them running them through the furnace again.

Q. When did you first learn the value of this material, or that it was valuable?

A. Well, I suppose I learned it was more valuable when I commenced using it. Mr. Spearman used it in 1864.

Q. Did Mr. Spearman use it regularly, or use it up clean in his blast-furnace, at the time you mentioned?

A. I don't think he used it as clean as I do. Mr. Spearman was just about as careful as a man could be; there would some get out sometimes.

Q. What value do you place upon it in comparison with scrap-iron, of the ordinary blast-furnace scrap?

A. Sometimes they are worth more than scrap, and sometimes less, and sometimes not worth saving.

Q. What is the average value, as compared with the value of scrap, to the best of your knowledge?

A. They would compare if there was $\frac{50}{100}$ of iron in the scrap and the same in the runners. The runners would be worth $\frac{3}{5}$ about of what the scrap was worth.

Q. How long have you known this fact?

201 A. Have had this idea about five years. Am not certain on that, as I have no means of testing the value of the runners, as I have not weighed it into my furnace, always throwing it into my furnace by the shovelful or piece, never keeping any weight.

Q. What do you usually do with the material composed of white iron chemically combined or mixed with cinder, which you sometimes find in the trough or runners?

A. We save it and run it through the furnace again.

Q. Do you treat it the same or differently from the runners, or the slag found in the runners, which contain metal'ic iron in the form of shot or globules, as you before testified?

A. If the white iron was accompanied with black cinder we put some

fluxing material in with it to work it. The grey iron, accompanied with grey cinder, would not need it.

Q. This white iron, accompanied with black cinder, is what you refer'ed to as bull-dog cinder, is it not?

A. Bull-dog cinder, such as I refer'ed to, is unseparated materia', whilst white iron would certainly be separated.

Q. Then there are at least three different kinds of material or iron-bearing cinder found in the runners after casting, namely, the grey cinder, holding the globules or shot of grey metal'ic iron; the darker cinder, bearing white iron; and the bull-dog cinder, which contains iron throughout or unreduced from the ore; is that your experience?

A. Yes.

202 Q. Have you ever tested the cinder or slag which flows from the tapping-hole, and is not contained in the runner after casting, with a view of ascertaining the amount of iron in it?

A. I have never made any analysis of it.

Q. What disposition have you made of it?

A. Hauled it out with the rest of the cinder considered by us to be worthless.

Q. Have you ever tested the slag or cinder which flows from the cinder-notch with a view to determine the amount of iron in it?

A. Not to determine the amount of iron in it, but to determine if there was iron in it. We take it in a liquid state and dip it into water; if it is good cinder, not containing iron, it will foam up, and be easily crushed with the hand when cold. If unseparated it will remain hard and solid.

Q. In the latter case is that called bull-dog cinder?

A. It would be either that or pertaining to it.

Q. Then the cinder which flows from the cinder-notch will sometimes contain iron, as well as the cinder which flows from the tapping-hole, and the cinder which is found in the runner after casting?

A. It may contain iron, but not in a metal'ic form.

Q. Is there any other portion of the furnace or outlet from which cinder flows than the cinder-notch and the tapping-hole?

A. Not ordinarily.

Q. What would you say as to the probability of 20 to 50 per cent. of iron being found all through blast-furnace cinder or slag?

A. I think it very improbable that you would find, taking runners and all, 2 per cent.

203 Q. Do you know whether or not it has been customary to put all the cinder of blast-furnaces through a process for the purpose of extracting the iron therefrom?

A. I know, by reading, that in some countries where labor is cheap they do stamp and wash their cinders. It has been tried in this country, but without profit.

Q. Where has it been tried in this country and prove' to be unprofitable, as you state?

A. At Niles, Ohio; so I have been informed. I have no personal knowledge of it.

Q. In what portion of the cinder do you find the greatest amount of iron, ordinarily?

A. In the bull-dog or unseparated cinder.

Q. Does bull-dog cinder alway' contain a large percentage of iron?

A. I think it always contains most of the iron that was in the iron-making material, but not in the metal'ic state.

Q. Have you ever known of its having been used for other purposes than resmelting?

A. I don't know as I have. I have seen lots of furnacemen throw it away.

Q. Have you not also seen lots of furnacemen throw away the runners?

A. Yes, sir.

Q. Have you ever tried to smelt furnace slag containing iron in a blast-furnace by itself; that is, without being mixed with ore and fluxing material, or being put into a furnace in which ore was smelted at the same time with the iron-bearing slag?

A. I never have.

Q. Did you ever try to smelt this material without being mixed
204 with ore, or with scrap, or iron in some other form, in any kind of a furnace?

A. I never did.

Q. Did you ever melt or smelt furnace-runners, and extract the iron therefrom by immersing them in molten metal'ic iron?

A. No; I never tried melting any of the runners in that way, though we do light scrap in our chills.

Q. Is not the portion of the runners which you use for the purpose of resmelting almost pure metal'ic iron?

A. No; they vary in the percentage of iron.

Q. When and where did you first buy the furnace-runners which you smelted in the Struthers Furnace?

A. I bought them before the first shipment which I gave you, which was April 8th, 1872. I bought them at Mineral Ridge Furnace, of which John Grist was manager.

Q. What did you pay for them; how much per ton?

A. I think in the neighborhood of 3 dollars per ton. The price was the same as that of mill cinders at that time.

Q. Have you ever superintended, or seen in practical operation, a cold-blast furnace?

A. No, sir; I never have.

Q. You have stated that the difference in construction between an ordinary blast-furnace and a cupola furnace is that the walls in the former are inclined from the top of the boshes to the top, whilst the walls of the latter from the boshes to the filling-doors are vertical. What do you mean by the "boshes?"

A. It is that part of the stack from the top of the crucible to
205 the lining, built at an angle of 3 inches to the foot, inclining outward for the purpose of forming a rest for the stock.

Q. Can you smelt mill cinder in a cupola furnace?

A. Yes.

Q. Can you smelt ore?

A. Yes; I did at Sharpsburg once, but did not get any metal'ic iron.

Q. Did you get any metal'ic iron out of mill cinder?

A. I never smelted it.

Q. Have you smelted either, or both together, in a blast-furnace, and made iron therefrom?

A. I have.

Q. Could you do it in a cold-blast furnace?

A. I think so.

Q. If you can produce metal'ic iron in this way in a blast-furnace, and cannot do it in a cupola furnace, do you consider the principle of con-

struction of these furnaces and their manner of operation the same, or different?

A. Their smelting qualities and principles are essentially the same, but a cupola furnace, as ordinarily built, is not high enough to give the mill cinder and ores an opportunity to become chemically changed so as to smelt and separate into pig-iron.

At this point adjourned till 8.30 a. m. to-morrow morning.

TUESDAY MORNING, *March 16th*, 1875.

Q. Are you familiar with the Bessemer process of making steel? If yea, please describe it.

A. I am not familiar with it so I can describe it.

Q. Are you acquainted with the principles of that operation?

206 A. Am generally acquainted; not so as to describe it minutely.

Q. Can you tell what constitutes the difference between pig metal and steel?

A. I am not posted now so as to give it.

Q. Can you tell which of the two, steel or iron, is most highly carbonized?

A. I suppose pig-iron is most highly carbonized.

Q. Is not Bessemer steel made from pig-iron by decarbonizing the metal by means of a blast of air injected through it when in a molten state?

A. I think it is decarbonized by the process described above, and then carbon added by the addition of "spigle."

Q. Then by blowing oxygen or the air through molten pig-metal the effect is to decarbonize the metal?

A. Yes; that is the process as I understand it, in the process of making Bessemer steel.

Q. Suppose, then, that you put scrap-iron, or the metal'ic iron contained in the slag or runners you have been testifying about, through the stack of a blast-furnace, in such case will the product be the same as pig-metal made directly from the ore?

A. When run through the blast furnace in connection with ore the iron would be the same.

Q. Suppose you put scrap-iron, or the metal'ic iron contained in the slag or runners about which you have been testifying, through the stack of a blast-furnace without being mixed with ore, will the product be the same as metal made directly from the ore?

207 A. If the fuel and blast used are the same used for smelting ore, the product, I think, would be the same slightly decarbonized.

Q. Why would it be decarbonized?

A. Because metal'ic iron being in a molten state and separated from earthy or foreign matters would absorb oxygen from the blast.

Q. Then the oxygen of the blast has a chemical effect upon the metal with which it is brought in contact while in a molten state?

A. Yes; I think it has.

Q. Is not the loss of carbon accompanied by hardening of pig-metal?

A. I ain't posted enough to answer that.

Q. Is there any difference at all between ordinary pig-metal and metal which has been decarbonized?

A. I think so; it assumes another form altogether after being decarbonized.

Q. Do you know of any other reagent than oxygen by means of which iron can be decarbonized?

A. I don't know that I do; I don't profess to be an expert in chemistry.

Q. You have testified in your direct testimony that no chemical change takes place in the material of the trough-runner while being smelted in the blast-furnace; do you mean to say that the oxygen of the blast produces no chemical change in the metal with which it is brought in contact during this process?

A. The iron from runners when melted passes so quickly the crucible that the change is very slight.

208 Q. Does it not come in contact, or is it not in contact, with a very large volume of air from the period at which it begins to heat until it liquifies and separates from the slag?

A. I think it would only be exposed to the air at one point where the air was going into the furnace. My opinion is, that after the air goes into the furnace and becomes combined with the carbon of the fuel it forms a different combination, or gas.

Q. Do you know how many cubic feet of air passes through the tuyeres into the furnace?

A. In the ordinary running of our furnace we blow a volume of air equal to 240 feet in length, 6 feet in diameter at atmospheric pressure.

Q. You say in your direct examination that there is no difference between the hot blast and the cold blast, except the degree of heat, and no chemical difference in the operation or effect upon material operated upon except that less fuel is required with the hot blast; is this a correct statement of your opinion?

A. I think there is no difference, only what would be produced by the absence of heat in the air blowing into the furnace.

Q. Is there any difference between pig-iron made in a cold-blast furnace and pig-iron made in a hot-blast furnace?

A. There is some difference, but I am not able to tell the chemical difference.

Q. There being a difference in the result produced, chemically speaking, do you still think there is no difference in the principle and operation of these two different furnaces?

A. I know of no difference, only those I have described.

209 Q. You say you do not know of any difference between the operation and effect of cold blast and hot blast in producing results in a furnace or cupola, aside from the additional melting force afforded by the hot blast, and you have also stated that you cannot produce metal'ic iron from ore or mill cinder in a cupola furnace, whilst you can in a blast-furnace. If there is no difference except the additional melting force afforded by the hot blast, how is it that you can produce metal from these materials in a blast-furnace and not in a cupola furnace?

A. A common ordinary foundry cupola is not high enough to give the ores and mill cinder time to be chemically changed by the gasses so as to separate when melted to make pig-iron.

Q. Then the difference in the result is due to the difference in principle of construction of the furnaces, the smelting, or what is ordinarily known as the blast-furnace being constructed to retain the stock and subject it to a longer process than is required in a foundry cupola; is that correct?

A. I will say that a foundry cupola being constructed for the purpose of melting metal'ic iron does not require the chemical change that ores or mill cinder require.

Q. Do you mean to be understood that there is no difference in the

principle and operation of a blast furnace and a foundry cupola except the additional melting force afforded by the hot blast?

210 A. I do not so wish to be understood.

Q. Then explain the difference in principle between these two different furnaces.

A. The furnace is constructed not only to melt the iron, but also to chemically change the ores to be smelted, whilst the cupola is constructed for the purpose of remelting pig-iron or metal'ic iron.

Q. In your experience, have you ever found it necessary for the proper working of the furnace to add scrap or pig iron to the stock, in the stack of the furnace?

A. We can frequently assist the working of a furnace by adding scrap.

Q. What effect has it upon the working of a furnace?

A. Causes it to run faster.

Q. Does it increase the heat of a furnace?

A. No.

Q. How then does it make the furnace run faster?

A. By decreasing the heat. It melts at a higher point than ore does and assists the stock in moving.

Q. Then in order to melt scrap-iron you require a greater degree of heat than you do to melt ore; what do you mean by melting at a higher point?

A. A higher point from the tuyeres in the furnace.

Q. Then it don't require so much heat; is that your opinion?

A. Not so much in requiring a different degree of heat as in being prepared to melt at any point in the furnace where it receives sufficient heat.

Q. Suppose a furnace in operation the lower half of the burden or stock being composed of ore charged with fuel and fluxing ma-

211 terials in the usual way, and that you then add or charge the furnace with scrap or metal'ic iron contained in the slag of the runners and charged with a proper amount of fuel and fluxing material, what would be the result; do you think that the metal'ic iron would melt and run through the lower portion of the stock, and be first deposited on the hearth?

A. It would melt and be deposited in the hearth before ores charged immediately before it.

Q. Suppose you commenced to charge with the scrap, after having tapped the furnace and removed the metal from the hearth, in the process of casting would the scrap metal be first deposited on the hearth; that is, would it melt and run through the ore, which has not come to the melting point?

A. It would arrive at the crucible or hearth before the iron from ore charged in the furnace immediately before the scrap.

Q. Suppose that the metal of the scrap or runners was different from the metal extracted from the ore, how would the one affect the other and what sort of pig metal would you obtain?

A. They would unite together, forming a metal which might change the metal to a different metal from either metal made from the ore or that made from the runner or scrap.

Q. Then the addition of the runners to the ore stock in a blast-furnace may change the nature or quality of the pig-iron produced?

A. They may, assuming that they are of different nature or quality when charged in a furnace.

212 Q. How would it be with the pig metal supposing that the runner metal was first deposited upon the hearth with the ore metal

above it, or that it was deposited in the crucible in successive layers with the ore metal, would you get a uniform or mixed pig?

A. I think the iron would assimilate and combine in the crucible making uniform iron; I think the pig would be uniform.

Q. In casting pig-iron, do you find the quality of the metal the same throughout the cast; that is, is all the metal of one casting uniform in quality?

A. We don't always find it the same in quality as regards openness.

Q. Do you find any difference in it as regards hardness and color?

A. We do.

Q. When you are making number one mill metal do you use any of the iron containing slag called runners in your furnace?

A. We do.

Q. How is it as regards No. 1 foundry metal?

A. We use it then also.

Q. Do you make no difference in respect to its use when making either foundry or mill iron?

A. We make no difference, using them when we think the furnace will stand "scrapping."

Q. State particularly the time when; and the quantities of furnace-runners that you have purchased from furnace-men, giving names
213 and places of business of said men.

A. (Witness refers to memoranda in his possession.) The first purchase, as near as I can tell, was the 1st of April, 1872, of John Grist, at Mineral Ridge, Trumbull County, Ohio. Amount, $87\frac{845}{2240}$ tons. Next purchase was August 18th, 1873, of Jonathan Warner, doing business at the same place. Don't know how many tons I bought of him.

Q. What did you do with the 87 odd tons that you purchased from Grist?

A. I run most of them through the Struthers Furnace; sold some of them to the Co-operative Stove Company.

Q. How much of that first lot did you sell to this association?

A. I could not tell; there might be some mixed with our own runners.

Q. How much per ton did you get for them?

A. We sold some at $8 per ton on the cars, some at $12, and some at $16; probably none out of the first lot I bought for more than $8.

Q. What was the value of scrap at that time?

A. I would say $30, but I don't know.

Q. What was the value of pig-iron at that time?

A. Probably $50 or $55; I can't tell.

Q. What was the value of the ores you were then using?

A. Ore at the furnace at that time cost us $10.50 or $11.

Q. When did you deliver the runners to the Foundry Association at Beaver Falls?

A. The first was in April, 1872, and we have been selling them since, the last sale being in November, 1874.

214 Q. How much did you sell in April, 1872?

A. We sold ten gross tons at that time.

Q. When did you next deliver any?

A. I can't tell without reference to the books.

Q. Did you deliver any in the year 1873?

A. Yes; I think so.

Q. At what time in 1873?

A. I should think all through the year; probably shipped every six weeks.

Q. Did you ship any in 1873, prior to September?

A. Yes.

Q. How much?

A. I could not tell exactly how much without reference to the books.

Q. What proportion of foundry iron did you sell to be mixed with them?

A. I cannot tell that without reference to the books.

Q. Did you ever sell any bull-dog cinder or any other kind of slag except trough-runners to these or other foundrymen?

A. We never sold any of what I call bull-dog cinder. We never sold any other kind except the runners.

Q. Were the runners sold selected, or did you take them as they came?

A. They were all selected; that is, there was grey iron contained in them excluding those that contained white iron or were made when the furnace was running badly.

Q. Did you see stove-plates cast from the cupola of the Beaver Falls Foundry Association at the time you speak of in your direct examination?

215 A. I saw stove-plates and hollowware cast from the iron that came from the cupola when charged with pig-iron and furnace-runners.

Q. Did you see the cupola charged before casting?

A. I did.

Q. What proportion of iron and runners were used in charging the cupola?

A. I think about 25 per cent. of the material put in was runners; 25 per cent., that is 75 pounds of pig-iron, and 25 pounds of runners.

Q. Did you ever see them cast pig-iron made from runners alone?

A. I did not.

Q. Are there any blast-furnaces at Beaver Falls, Pennsylvania?

A. Not that I know of.

Q. Are there any in the immediate neighborhood?

A. None nearer than Wampum.

Q. How far is Wampum from Beaver Falls?

A. Ten or 12 miles, I should think.

Q. How far is the Struthers Iron Works from Beaver Falls?

A. In the neighborhood of 28 miles, I should think.

Q. Do you know that this association have bought runners from any one else?

A. I don't know that they have.

Q. Have you sold more than 150 tons to them within the period from April, 1872, till now?

A. Probably 150 tons and a fraction, that is about it.

Q. You have stated in your direct testimony that you had
216 spoken to Homer Hamilton, the defendant, about melting furnace-runners for you in his foundry. When was this?

A. In the latter part of the year 1871, or beginning of the year 1872.

Q. He refused to do it, I understand?

A. He said he would not do it at that time.

Q. Did he say he was afraid he would spoil his cupola furnace with them?

A. He said he had all he could do, and he wouldn't have his cupola bunged up and spoiled at that time.

Q. Did he, at any subsequent time, work them in his cupola furnace for you?

A. I think he did work them afterwards.

Q. When was that?

A. I don't know that I can tell you when he worked the first.

Q. Has he ever bought any from you, or have you ever delivered any to him from the Struthers Furnace?

A. Never sold him any furnace-runners from the Struthers Furnace.

Q. Have you any interest in the business of collecting these runners and other waste material which has been thrown out on furnace dumps, or other places, and extracting the iron therefrom in the foundry cupola of Homer Hamilton & Co.?

A. I was to have some interest in the profits that might arise in extracting the iron from furnace-runners at their foundry, which they and I might buy.

217 Q. Have you a similar arrangement with any other firm or firms who make iron from foundry cupolas of this refuse material?

A. I have no other arrangement with other firms or persons.

Q. When did you enter into this contract or agreement with Homer Hamilton & Co.?

A. I couldn't tell you whether it was in the fall of 1872 or the winter or spring of 1873.

Q. Have you supplied them with any material for this purpose purchased or gathered from the cinder dump of other furnaces than your own?

A. I made one purchase from Jonathan Warner, Mineral Ridge, to be loaded by him on the cares and directed him to ship it to Horner Hamilton & Co.

Q. State when you did this.

A. (Witness here refers to written memoranda.) It was in August, 1873.

Q. Was any material delivered to Homer Hamilton & Co. by Warner upon your order, as stated?

A. Yes, I understood so.

Q. Do you know whether it was or was not?

A. I did not see it. I was showed a pile of runners they said came from there.

Q. Where and when?

A. It was down at the foundry of Homer Hamilton & Co. shortly after the time I made the contract.

Q. Which foundry do you allude to, the new or the old?

A. The new foundry.

218 Q. Can you state positively that you saw this material there prior to the first day of October, 1873?

A. Yes, a large pile of it.

Q. Can you state positively that you saw it there before the 1st day of September, 1873?

A. Yes, I saw a large pile of it there before the date of the contract with Jonathan Warner; that is, before August 18th, 1873.

Q. When did you first see Homer Hamilton & Co. making pig-iron of this material in their cupola furnace?

A. I don't know that I can fix any date.

Q. Was it before or after the time when you first saw the material there?

A. I think I did not see them making any pig-iron before the time I

speak of, but I saw pig-iron they said was made from that material several months prior to that time.

Q. Did not this Warner whom you have refer'ed to also engage in the same business, making iron from the refuse of blast-furnaces?

A. I have understood that Mr. Warner's sons engaged in it.

Q. When did they commence?

A. I think it was after the expiration of the year 1873, in the fore part of the year 1874.

(Objected to by counsel for defendants.)

Q. Do you know of any one else who has started since that time?

(Objected to by counsel for defendants.)

A. Only by hearsay.

Q. What have you heard about this matter?

219 A. I have heard that Mr. Vinton and some others at Sharon have been making iron in this manner.

Q. When you consulted with Mr. Struthers about taking out a patent for making iron from this refuse material did you take any legal advise in the matter?

A. From no other person than Mr. Struthers. I considered him a good legal adviser.

Q. Did you make any application at the Patent Office or take any steps with a view to secure letters patent for the discovery you had made?

A. I did not take any steps to secure a patent, as he told me there was nothing in it but what had been discovered long ago.

Q. Did you yourself build or cause to be built any foundry cupola furnace for the purpose of making iron runners or other refuse of a blast-furnace therein?

A. I did not.

Q. If you have not already stated, please give the date of the partnership formed between you and Homer Hamilton & Co.

A. I think I did give it as nearly as I could. It was in the fall of 1872 or spring of 1873.

Re-examination:

Q. State what, in your judgment, would be the result of using bull-dog cinder in a foundry cupola in the ordinary mode of using pig-iron.

A. I think it would melt and run out and still remain unseparated as before it was melted.

220 Q. State what, in your judgment, would be the result of placing a bed of coke or other suitable fuel in a foundry cupola, and on the top of the coke a small quantity of scrap or other oxidized iron, and thence introduce as evenly as possibly on the top of the coke and iron oxide a quantity of bull-dog cinders, and then sprinkle a small quantity of limestone broken up into small pieces on top of that, and so on alternately until the burden of the cupola was completed and then apply the blast and melt it.

A. If the scrap-iron refer'ed to is cast scrap you might possibly obtain from the cupola nearly as much metal'ic iron as was contained in the scrap, but if the scrap was wrought iron it would not yield when melted with the bulldog-cinder any cast iron or pig-iron.

Q. State what, in your judgment, would be the result consequent upon the melting of the contents of the burden of a foundry cupola charged in the following manner, after the furnace is in operation, first, 3 bushels of coke; second, 50 pounds of iron oxide, scrap or scale; 3rd, 800 pounds of bull-dog cinder; fourth, ¼ of a bushel of limestone thrown into the cupola in succession, and from time to time as required.

A. If it does melt it would be a mass of unseparated material, excepting that iron might melt from the scrap, which possibly might show in a metal'ic form.

221 Q. Substitute in the last question for the 800 pounds of bull-dog cinder 800 pounds of other ordinary furnace cinders or slag, excluding runners, what then would be the result, assuming as before that the burden would melt?

A. In this case what iron might be produced from melting the scrap, if not chemically destroyed by the oxide, would show nice clear iron, I should think, with no addition from melting the furnace slag or cinder.

Q. What would you say in the case above supposed, where bull-dog cinders are used, as to whether the contents of the cupola would actually melt by the use of the ordinary appliances used with foundry cupolas for melting purposes?

A. I don't think it would melt so as to be liquid enough to run out of the cupola.

Q. Now please state what there is made, if anything, by the running of a blast-furnace that can be used in a foundry cupola for the purpose of making pig-iron or castings, aside from pig-iron, scrap, and trough-runners.

A. Nothing, that I know of, of iron-making material.

Q. You speak in your cross-examination of cupola furnaces. Please explain what you mean by that.

A. A cupola blast-furnace is one on which the lining and stack proper stands on metal columns.

Q. State whether or not you have seen foundry cupolas constructed on the same model as cupola furnaces.

A. So far as standing on metal columns, I have.

222 Q. State whether or not you have seen any foundry cupola known as the McKenzie model.

A. I don't know that I know it by that name.

Recross-examination:

Q. Have you ever used bull-dog or any other cinder, or tried to use them, in the manner indicated in your re-examination?

A. I never have.

T. W. KENNEDY.

Also HOMER HAMILTON, called as a witness on the part of the defendants, and sworn as hereinafter certified by me, testifies as follows:

1st question (by SANDERSON, counsel for defendants). State your name, age, and residence.

A. Homer Hamilton; am 39 years old; residence, Youngstown, Ohio.

Q. State in what business and employment you are now engaged, and for how long you have been engaged therein.

A. Am superintendent of a foundry and machine works, at present Homer Hamilton & Co.'s works, I believe since 1862, when that partnership was formed.

Q. Previous to that time in what business were you engaged, and how long?

A. From 1856 to 1862 was engaged in the same business with
223 Predmore and Hamilton. For about 3 years previous to that time I was engaged as an apprentice to the machinist's trade.

Q. Who composed the firm of Homer Hamilton & Co. in July, 1874, and who compose the firm now?

A. John Stambaugh, William Tod, Frederick Gerwig, and myself, and is the same now.

Q. State where the foundry of the defendants was located in the spring of 1873, where the same is now located, or, if there be more than one, where each is located.

A. Their foundry is located on lands adjoining Market street, near the river. It was so located in the spring of 1873. We have a foundry building at the south end of Boardman street, with cupola still standing, which we have not used since February, 1873.

Q. At what time did you remove to your river works near the foot of Market street?

A. In February, 1873.

Q. During the time of the existence of the firm of Homer Hamilton & Co. who has superintended and had control of the operations of the cupola and the making of the castings?

A. I have.

Q. State what experience, if any, you had prior to October 1st, 1873, at your foundry, in the use of furnace trough-runners; how you came to use them, if at all; and for what purpose.

A. The first notice that ever I took of the matter was some time between 1862 and 1865. We had received some iron from the Eagle
224 Iron Company, managed by Myron Arms, that had a quantity of these runners in. The cupola tender called me over to where the iron was, and called my attention to it. I examined it, and said to him that it must be iron, and for him to use it as such, which he did. Some time prior to 1873, Mr. Kennedy called at my office, and we had a talk in regard to the matter, and we together went to the cinder pile with a hammer, broke a piece of runner and examined it. I told him that I had so much work for my cupola that it would be impossible to use it at that time for melting these runners, which he insisted I should do. 2nd. Some time previous to March 25th, 1873, I had another talk with Mr. Kennedy, and agreed to melt runners. I then collected an amount of runners, and March 25th, 1873, I melted the first runners alone. I did not melt any more till Sept. 30th, 1873.

Q. At the time you speak of, when the iron was procured from the Eagle Furnace, state whether the runners contained in it were used alone or in connection with the pig-iron.

A. Were used in connection with pig-iron.

Q. After you resumed the melting of this material in September, 1873, state whether or not you have been using it ever since, and for what purpose.

A. We have, irregularly, ever since; sometimes for making pig-iron, and sometimes for making castings.

Q. When you melted this material in March, 1873, explain particularly how you made up the burden of the cupola, what other
225 material you used, in what quality and what quantity of runners in proportion to the other materials.

A. We made up the burden of the cupola, as nearly as I can recollect, exactly the same as for the same weight of pig-iron. We go by bulk in charging our cupola; we first fill the cupola about four or five feet above the tuyeres with coke. We then place about 4,000 pounds of iron immediately on top the coke; we place upon that, say, 2 shovels full of limestone broken in small pieces. Then we place about a foot in depth of coke on top, then 10 hundred of iron, about the same amount of limestone as before, which proportion is kept up to the end of the heat, be it large or small. This applies to a cupola about 48 inches in diameter on inside. Should the diameter vary the weight of iron must vary so as to get the same depth of iron all time.

Q. What change from the above method of charging the cupola, if any, did you make in March, 1873, at the time you used furnace-runners instead of pig-iron?

A. We made no change whatever.

Q. Prior to that time state whether or not in the melting of pig-iron you used limestone, as above indicated; and, if so, for what purpose.

A. We sometimes used limestone, and sometimes did not; used it for a flux.

Q. Under what circumstances did you use it, and under what circumstances did you not use it?

226 A. I used it when the cupola had worked badly, previously because the cupola tender would say that the scaffolding of the cupola was caused by the cinder being too thick, but I will say that I never could detect any difference.

Q. For how long prior to October 1st, 1873, had you known of the use of limestone for any purpose in foundry cupolas?

A. I have known it to be used ever since I knew anything of the foundry business, for 20 years.

Q. State whether, after you resumed the working of furnace runners in September, 1873, you used limestone, and charged your cupola as above stated; and, if not, what change did you make?

A. At first we used limestone, as above stated; we afterwards, by Mr. Kennedy's advice, increased the quantity of limestone used, but as our experience proved it was of no benefit afterwards; we used limestone as first stated, and on several occasions used none at all. I think we made no change in anything else, but may have added a little coke when there was a large amount of cinder in the runners we were using.

Q. State what material it is that you mean by furnace-runners.

A. I mean the material that last runs from the furnace after casting, and which is found in the furnace trough and runner of a blast-furnace, and consists of globules of metal'ic iron that is held in suspension in the cinder of the furnace.

227 Q. What difficulty, if any, is there on the part of an ordinary foundryman or furnaceman in detecting the presence of metal'ic iron in that material?

A. There is no difficulty whatever.

Q. At the time you smelted the runners in March, 1873, or at any time afterwards in the smelting of them, state whether or not you made them granular or spongy in any of the well known ways before placing them in the cupola, or whether or not in connection with them, or in a bed or strata under them, you used scrap or oxidized iron or scale, or black oxide of iron in the cupola with them.

A. No, sir, I did not.

Q. In order to melt furnace-runners in a foundry cupola for the purpose of making pig-iron or castings, state what necessity there is to use limestone in any quantity.

A. I think that a little limestone makes the cinder more liquid and is easier tapped off. I have experimented and found no other advantage in using the limestone.

Q. State, then, whether or not the limestone is used for any other purpose than a fluxing material.

A. I use it for no other purpose.

Q. State whether or not the use of limestone as a fluxing material in the smelting of ores in blast-furnaces, in the melting of pig-iron in

foundry cupolas, or in the melting of furnace-runners in foundry cupolas was new or not generally known among furnace or foundrymen or iron manufactures generally prior to October 1st, 1873.

A. It was not new, and was generally known.

228 Q. State what there was new and not generally known, if anything, prior to October 1st, 1873, among foundrymen in the smelting of iron material by the application of cold blast to the cupola, the use of coke or charcoal as fuel, and limestone as fluxing material in order to produce metal'ic iron for pigs or castings.

A. Nothing new, and it was known among foundrymen prior to that time.

Q. State what necessity there is in the use of furnace-runners in foundry cupolas for the purpose of making pig-iron or castings to use in connection with them in making up the burden of the cupola any scrap or oxidized iron.

A. I see no use of it.

Q. State whether or not you are familiar with and understand the mode of construction and process of operation of the ordinary blast-furnace.

A. I am perfectly acquainted with the construction of an ordinary blast-furnace; know something of the mode of operation in a general way.

Q. State what differences there are, if any, in the shape of the ordinary cupola furnace and the ordinary foundry cupolas in their interior.

A. When an ordinary foundry cupola is built the walls are generally parallel, but after a few days' use they melt out in an egg-shape. The walls of a blast-furnace are built in somewhat similar shape last spoken of, and their tendency is to become nearer parallel.

229 Q. Have you the means of knowing whether or not any chemical change or changes take place in the material generally used in foundry cupolas when melting the same in order to make metal'ic iron in the ordinary way?

A. Yes, sir.

Q. In the smelting of the ordinary trough-runners in order to make pig-iron or castings in the mode in which you have stated above that you did it, what chemical change or changes is effected in the operation of smelting them?

A. I think there is no chemical change.

Q. State whether you ever tried the smelting of ores, or of bull-dog cinder, or the cinder and slag of blast-furnaces, not including the runners, in a foundry cupola.

A. No, sir.

Q. What, in your judgment, would be the result in the use of bull-dog cinders in place of furnace-runners or pig-iron in the proportion you have heretofore stated in making up the burden of the foundry cupola?

A. In case you used bull-dog cinder the result would be that this material would be melted and would be mixed with the products of the lime and fuel and come out of the cupola in that state.

Q. What, in your judgment, would be the result if scrap or oxidized iron, or scale or black oxide of iron, were used in connection with the material last named?

A. If scrap iron were used it would fall to the bottom and be separate and distinct from the other; but if scale or black oxide of

230 iron were used it would be mixed with the products of the cupola.

Q. Suppose the scrap-iron used in the case above supposed was wrought-iron, what would be the result?

A. If it were in small enough pieces it would become oxidized and mixed with the mass.

Q. What do you say, then, as to the possibility of making pig-iron or castings in a foundry cupola from bull-dog cinder or the slag or refuse of blast-furnaces, excluding runners, by means of the fuel you have mentioned, and the use of limestone you have mentioned, and the use of scrap-iron or other oxidized iron, or scale or black oxide of iron in any quantity?

A. It would be impossible in an ordinary cupola.

Q. State how long you have known the furnace trough-runners contained metal'ic iron.

A. The first notice that I took of the matter was the time before alluded to that I examined what came from Eagle Furnace.

Q. State what you know, if anything, as to its being generally known among iron manufacturers, since the time you refer to, that furnace-runners contained iron in a metal'ic form.

A. I can't give any exact date of my first knowledge in the matter; but I heard the matter talked of by furnacemen in my presence at least 7 or eight years ago.

231 State whether or not, during the prosecution of your business, you ever purchased or procured any pig-iron upon which there was adhering quantities of slag or cinder.

A. Yes, sir.

Q. State whether or not it was purchased as ordinary pig-iron, or as pig-iron and slag.

A. As ordinary pig-iron.

Q. State about what percentage of the mass was metal'ic iron.

A. I have purchased pig-iron in which there would be some pigs in which there would be one-quarter of the bulk furnace cinder.

Q. State whether or not you have procured and used furnace-runners containing about the same quantity of metal'ic iron.

A. Yes, sir; I have.

Q. State what differences there are, if any, in the smelting of this pig-iron to which slag adher's and the runners to which your attention has been called in the cupola in order to make pig-iron or castings either in principle, process, appliances, or results.

A. No difference.

Q. State what differences, if any, between the appliances, process, principles, or results in the smelting of ordinary furnace-runners in foundry cupolas.

A. In smelting a small quantity of pig-iron the cinder is allowed to remain in the cupola until the operation is concluded. In smelting large quantities of pig-iron at one time, we find it convenient to have a cinder-hole to tap off the accumulating cinder. In smelting run-

232 ners we always use a cinder-hole, because there is more cinder in the cupola. In case there is a large amount of cinder in the runner we use a quantity more of coke than we do with pig-iron.

Q. What other differences, if any, are there?

A. There is no other difference as we now operate.

Q. At the time you first tried the operation of smelting the trough-runners alone, in March, 1873, what did you know, if anything, as to any one having or claiming to have letters patent, or having made or claiming to have made any application for letters patent for any process or improvement on any process in the manufacture of iron from furnace slag, or the refuse from blast or smelting furnaces?

A. I had no intimation of anything of the kind.

Q. About what time did you first learn that plaintiffs claimed to have letters patent concerning the above matter?

A. I can't give you the date of that; I would say about the first of 1874.

Q. How did you then learn it?

A. My foreman informed me that Mr. Vinton had been to our foundry in my absence and told him.

Q. At that time were you working furnace-runners at your foundry?

A. I think we were.

Q. At the time you worked them in March, 1873, state what quantity, if any, of furnace-runners you then had on hand, and where did you procure them?

233 A. As near as I can recollect, I had from 100 to 150 tons, some of which I had selected from furnace cinder that we were filling our yard with, and I can't remember where I did get the balance.

Q. Did you have a quantity that had been purchased and not been selected from cinders in your yard?

A. I think we had.

Q. At that time when you made the practical test of smelting the runners alone what did you manufacture from them?

A. Pig-iron.

Q. State who, aside from yourself, was present at the time, if any one, and knew what was being done.

A. I don't think I can state all who were present, but the following I distinctly remember: Mr. Gering, Mr. C. T. Meadsker, Mr. Frederick Kriskbaum, and our cupola-tender, Owen Mullhamen, and several railroad men; their names I do not know, and I think, but am not sure, Mr. Charles Himrod was there.

Q. What was said, if anything, at the time by you, or any of the others, as to the result effected on that occasion and concerning what was being done?

A. I don't remember any particular conversation, only that the results were about what I expected.

Q. State whether or not it was known to those present that you were making pig-iron from furnace-runners.

A. It was known by those employed there, but I am not positive as to the others.

Q. State which of those you have named above were employed there.

234 A. All I have named except Mr. Himrod.

Q. State whether or not they knew how the cupola at that time was charged.

A. Yes, sir, they did; because they helped to charge it.

Q. State what efforts, if any, were made to prevent any one from seeing or knowing what was being done or how it was being done.

A. There were no efforts made.

Q. State what difficulty there was or would have been for any person to have both seen and known had he been present both what was done and the mode of doing it.

A. There would be no difficulty.

Q. State whether or not after that time and prior to October 1st, 1873, you informed others aside from your employees, but including your partners, as to what you had done or could do in the way of making pig-iron from furnace-runners at your cupola in the way you have mentioned.

A. I informed my partners from first to last of the whole operation, and talked freely with a number of persons in regard to the matter.

Q. Within that same time state whether you purchased any quantity of runners with a view of manufacturing them in the manner aforesaid into pig-iron or castings or both.

Q. Yes, sir; I did.

Q. State about what quantity.

A. I can't state that definitely; several hundred tons.

235 Q. State whether or not you made or entered into an arrangement with Thomas W. Kennedy concerning their manufacture at your foundry prior to October 1st, 1873.

A. Yes, sir, I did.

At this point adjourned till to-morrow morning at 9 a. m.

WEDNESDAY MORNING, *March 17th*, 1875.

Q. State what you know, if anything, prior to October 1st, 1873, concerning the use of furnace-runners in blast-furnaces.

A. I knew of their being used years previous to October 1st, 1873.

Q. State what you know, if anything, prior to said time concerning the running of blast-furnaces by the operation of cold blast, either personally or from reading or conversation with furnacemen.

A. I never have saw a blast-furnace using cold blast in operation; have saw furnace not in operation that had been used so. I have used pig-iron made by cold blast; have talked with men who have used them, and have read considerable about the matter.

Q. State what you knew prior to said date as to the use of fuel in blast-furnaces, and as to the material used for fluxing purposes.

A. I have seen bituminous coal, coke, and anthracite coal used in furnaces; have heard of charcoal being used, but never saw it used. I have seen limestone used, and sometimes clay, the proportion of which I cannot state, but know they were varied to suit the circumstances.

236 Q. Previous to the same date what kind of blast—that is, cold or hot—was used in connection with foundry cupolas?

A. Cold blast.

Q. At the same date, and for two years prior thereto, state what there was new and not generally known, if anything, in the application of cold blast in operating foundry cupolas in the use of coke as fuel therein and the use of limestone as fluxing material in order to melt metal'ic iron.

A. There was nothing new.

Q. State whether or not you have given some attention to inventions in the way of making models, assisting in obtaining letters patent, or otherwise.

A. I have.

Q. Have you made such examination of the laws or rules pertaining to patents as to be able to give an opinion or judgment as to the patentability of principles, machines, processes, and combination?

A. I believe that I am well enough informed in the fundamental principles of patent law to enable me to form a fair opinion upon the subject.

Q. Please examine the specifications here shown you, marked March, 1875, Homer Hamilton, and then say what process, principle, or combination there is specified therein which at the date of it was new or not generally known at the time, leaving out of view the use of scrap or oxidized iron, and scale or black oxide of iron, as therein specified.

(Objected to by counsel for complainant.)

A. If you apply this to the melting of blast-furnace trough-run-
237 ners, there is nothing new except where it speaks of black oxide of manganese, salt, or litharge, or a mixture of them, and that I know nothing of.

Q. In your operations in melting furnace-runners at your foundry state whether or not you ever used the iron oxides, mentioned in the specifications, or strap-iron, or black oxide of manganese, or salt, or litharge, or any mixture of any two, or all three of these ingredients, as therein specified, or in any other manner.

A. Because the runners we have used are of the same quality of iron as the average run of the furnace they generally make too hard castings, we sometimes mix soft pig-iron with them when making castings. When making pig-iron some small pieces of scrap-iron may be mixed with them which we do not select, but we use no other of the above-mentioned articles.

Q. State whether or not, in your judgment, for the purpose of making either castings or pig-iron, it is necessary to use any of the articles except those you have referred to.

A. My experience has been although convenient it is not absolutely necessary to use limestone, and I have made castings and pig-iron using nothing but the furnace-runners, and coke, and cold blast.

Q. In the reduction of furnace-runners to pig-iron state whether or not, in your judgement, anything more is required than the fuel and blast specified.

A. No, sir; nothing is absolutely necessary.

Q. State whether or not, on any occasions in the making of pig-iron or castings at your foundry, you ever used or adopted the same process, or combinations specified in the specifications
238 above referred to, either in the proportions therein mentioned or otherwise.

(Objected to by counsel for complainants.)

A. No, sir; we did not.

Q. State whether or not, at any time, you entered into any arrangement, combination, or confederacy with the other defendants herein mentioned to infringe the rights of any patentee under any letters patent for any process or improvement in any process for reducing iron from the slug or refuse from blast or smelting furnace.

A. No, sir; I did not.

Q. What arrangement, agreement, or confederation did you, at any time, make with any one respecting any infringement of any letters patent as above specified, especially those claimed by the plaintiff herein?

A. I made no arrangement, agreement, or confederation with any one.

Q. In the melting of trough-runners in ordinary foundry cupolas, and in the melting of pig-iron therein, state what formation, if any, there is of metal'ic iron analagous to furnace trough runners, and state how and when the same is formed.

A. We find, after using the cupola, that globules of iron are mixed with the cinder in the spout around the tapping-hole, and in the cinder in the bottom of the cupola after dropping the bottom.

Q. In what respect, if any, does this material differ from ordinary trough-runners?

A. The globules of iron are generally larger and the cinder
239 is of a different quality.

Q. What is ordinarily done at foundries with the material?

A. It is sometimes dumped into the refuse pile, after the larger pieces being assorted by hand, and at other times the whole mass is put into a grinding mill, the cinder pulverized, and the metal'ic iron used in the cupola again. The pieces that are selected by hand as above spoken of are used in the cupola to make castings from.

Q. State for how long you have known of the facts stated in your last answer, and how long the material therein mentioned has been ordinarily used as therein stated.

A. I have known of its being selected by hand and used for 18 years; have known of its being pulverized about as long. I have had it pulverized 6 or 8 years ago.

Q. State what difference, if any, there was in the use for the purposes of remelting between these hand-selected pieces of cinder and metal'ic iron you have mentioned from foundry cupolas, either in process, principle, or appliances, and the remelting of furnace-runners in founderies.

A. There is no difference.

Q. Are you familiar with the mode of construction of the McKenzie cupola?

A. I am.

Q. State in what respects, if any, it differs in interior shape from the ordinary cupola blast-furnaces.

A. The profile of the interior of McKinzie's cupola is almost identical to that of some blast-furnaces.

240 Q. State to what extent the McKinzie pattern or others of the same shape, or nearly so, are used to your knowledge in foundries.

Q. The McKinzie cupola was built by us in about 1864, and used for several years, and I know of several others being in use. There is another patent cupola extant in which the crucible and boshes are used similar to blast-furnaces and which we experimented with, but the name I do not remember, and which came to us well recom'ended.

Cross-examination:

Q. (by Mr. McCallum, counsel for complainants). How much pig-iron did you make at the time you speak of, March 25th, 1873?

A. As near as I can remember, a ton.

Q. How much have you made since September 30th, 1873, the time you say you resumed operations?

A. Several hundred tons.

Q. Can you say more than three hundred tons?

A. Yes.

Q. Will you please ascertain and let me know?

A. Yes.

Q. How much of these runners, or mixture of slag and iron, does it ordinarily take to make a ton of pig-iron?

A. That depends upon the quality of the runners; we generally obtain from 55 to 75 per cent. in practice.

Q. Is it much loss of iron in the process of converting the material into pig-iron in the foundry cupola?

A. There is some loss. I would say somewhere between 4 and

241 8 per cent., or about the same that there would in the use of clear cast scrap-iron of the same sized globules.

Q. Then it takes from ¾ to twice as much of the slag material to make a ton of iron or castings than pig-iron itself?

A. It takes from 30 to 40 hundred of runners to yield one ton of pig-iron of 2,000.

Q. How much of this material have you collected from the cinder-dumps, or other places where it has been thrown out by the owners of blast-furnaces?

A. What amount we collected from the Himrod Furnace, from their dumps, was ordered to be thrown out, I suppose, and I cannot now give the amount. What we collected from Brown, Bonnell & Company's dumps was deposited there contrary to the owner's orders, and I cannot now give the exact amount. What was received from Warner was collected in piles and saved for sale or use; and what we purchased elsewhere I do not know the condition of, neither can I now state the exact amount that we received from any source.

Q. Did you personally superintend or direct the collection of this material from the dumps of the Himrod Furnace?

A. I think I went with our teamster the first load we got there; the hauling was done by my direction.

Q. How did you find it; scattered over the dump or how?

A. I think we did not get any over the sides of the dump, to my knowledge, but found it scattered over their cinder-yard, that
242 had been leveled, among stone, old boilers, castings, &c., that was scattered around.

Q. Do you know whether or not the parties who were employed in collecting this material, which was subsequently delivered to you, did ever have to dig into the dump of blast-furnaces to get it?

A. Some of them did.

Q. Have you ever seen cinder, like what you have been using in your cupola furnace, used in building walls or railway or river embankments, or for repairing roads or streets, and for other purposes than the production of iron therefrom?

A. I have seen it used, in connection with cinder, for railway embankments and other walls. I may have seen some odd pieces in cinder used for roads.

Q. Where did you get the cinder with which you were filling the yard of your new foundry, as you have testified?

A. I obtained some from Brown, Bonnell & Co's furnaces, and some from Himrod furnaces.

Q. What was your object in filling your yard, as you have stated, with cinder?

A. To make a gradual slope up to the foundation of the building, to prevent the cold air from going in and the sand from working out.

Q. Has it been customary to fix up the grounds or yards in and around foundries and furnaces with the refuse material of blast-furnaces when readily obtained?

243 A. Blast-furnace cinder, as produced, must be loaded on carts or wagons to be disposed of, and additional length of haul does not amount to much, consequently it is decidedly the cheapest material to make a fill with there is, provided the distance from the furnace to the place to be used is not too great.

Q. Do you know or have you seen any yard in or about this city dug over for the purpose of obtaining material like what you have been using in your cupola furnace?

A. Yes, sir.

Q. Whose yard do you refer to; or, if more than one, name them?

A. Himrod Company's yard, and the yard which is now our property, but formerly occupied and filled with cinder by the Himrod Furnace Company.

Q. Are you thoroughly posted as to the appearance and nature of this material you testify about under the name of furnace-runners?

A. I am posted as to the appearance, and know metal'ic iron when I see it, but as to cinder I could give no chemical analysis of it.

Q. Can you distinguish this material from pig-iron by its appearance only, or by the naked eye, without other test?

A. I can distinctly see the globules of iron at every fracture. I can distinguish it from pig-iron.

Q. Can you tell by the eye, and without other test, whether the slag of these runners contain' metal'ic iron or not, as you find them on the cinder-dumps of blast-furnaces?

A. I can.

244 Q. Can you distinguish in the same way, that is, by the eye alone, bull-dog cinder when you see it?

A. I don't know as I could, as sometimes a furnace yields black cinder, which is not what is usually called bull-dog.

Q. Can you distinguish bull-dog cinder from other cinder in the same way?

A. I don't think I could.

Q. Do you know the refuse material called kettle-bottoms?

A. I don't know anything by that name; but I know of cinder from blast furnaces being run in excavations in sand, allowed to cool, and being taken away in that form.

Q. Have you ever used any of that material, or a mixture of slag and iron in semi-spherical or round form?

A. Not to my knowledge.

Q. Do you know of the material technically called salamander?

A. I do know of it.

Q. Have you ever used any of that in your cupola furnace?

A. I think I have, but would not say positively, because it being so similar to pieces of pure iron that comes with our runners that I might be mistaken.

Q. Can you distinguish this material from pig-iron by sight alone?

A. I could easily distinguish it if in large pieces, but broken into small pieces there would be no difference of some specimens between it and pig-iron of the same size.

Q. Then, if pig-iron had lost its characteristic shape as a pig, and a similar sized piece of salamander was placed alongside of it, you

245 think you could not tell the one from the other?

A. I could not in some cases.

Q. Could you distinguish a small piece of the salamander material from a similar size piece of ordinary furnace-runner by sight?

A. Yes, sir; I think I could.

Q. Could you by sight alone distingish either or all of the following materials, to wit, pig-iron, salamander, furnace-runners, bulldog cinder, or the material referred to as kettle-bottom, from ordinary furnace slag or cinder?

A. Yes, sir; by color.

(Witness here shown specimen of material and asked if he brought that here.)

A. Yes, sir; I brought that here.

(Said specimen is offered in evidence marked "Exhibit H. H., March 17th, 1875.")

Q. Where did you find this specimen "H. H.?"

A. Near the railroad-switch track belonging to Brown, Bonnell & Co. on the land said to be owned by William J. Hitchcock.

Q. Describe the nature and appearance of the specimen, and state what you consider it to be.

A. The lighter colored strata, which was the top of the runner when deposited, is ordinary furnace slag or cinder; the blue looking portion, which constitutes the greater part of the mass, is composed of globules of grey metal'ic iron cemented together by a very small percentage of common furnace cinder or slag. The surface that has the sandy appearance is the sand of the runner, which has been so heated as
246 to become partially melted, and on becoming cool has partially cemented together. It is what we generally designate as trough-runner.

Q. What is the red portion?

A. The red portion is probably caused by the action of the air upon what iron may be mixed with it.

Q. Is that the kind of material you have been using in your cupola for the purpose of making pig-iron?

A. I think that is about a fair sample; sometimes we use the material with a greater amount of cinder or slag adhering to it, and sometimes less.

Q. Is all your material of this nature which you use substantially the same in appearance as this specimen?

A. No, sir.

Q. State the difference.

A. Sometimes we obtain pieces that show when broken no globules, especially in the lower part of the piece, but show the regular grain of pig-iron.

Q. How is it with regard to the external appearance of this material as you find it on the cinder dumps of the furnaces and other places you have described?

A. When freshly deposited it has the same appearance as the piece before us, but when having lain some length of time it becomes somewhat oxidized where it is fractured.

Q. Do the workmen you employ and have employed heretofore about the foundry cupola know pig-iron from runners or cinder mixed with runners so as to readily distinguish between them?

A. I think they do. I know they do fracture it with a sledge.
247 Q. Why did the cupola-tender call your attention to the metal you received from the Eagle Furnace, about which you have testified?

A. He broke and mixed all the iron that went into the cupola subject to my orders, and when he found any peculiarity either in pig or scrap iron he informed me, and obeyed my directions.

Q. How did you know at the time you speak of that the material referred to was furnace-runners?

A. I did not know how it was produced, but it was identical in appearance when fractured with a globular formation before alluded to.

Q. Did you then in fact know that the metal which you told the cupola-tender must be iron was furnace-runners?

A. No, sir.

Q. I understand you did not make any pig-iron in the interval between March 25, 1873, and September 30th, 1873, and that you only had made about a ton at the first-mentioned date; is that correct?

A. As near as I can remember, that is correct. I know I made none between those two dates.

Q. When you had the conversation you have related with Mr. Ken-

nedy did he claim to have made a discovery not generally known by others?

A. No, sir.

Q. Did you know it previous to that time; that is, did you know that the runners contained iron which could be resmelted?

A. I had not given the matter much attention, but knew the runners contained iron and was being remelted.

248 Q. Why, then, was it necessary for you to go to a cinder pile and break up the runners and examine them in order to ascertain this fact?

A. It was not necessary.

Q. Why did you do it on that occasion?

A. Mr. Kennedy, I think, talked to me then for the first time in regard to melting the runners in a cupola, and we had some talk in regard to the proportions of furnace cinder that would be attached to the runners.

Q. How much of the material did you collect prior to March 25th, 1873?

A. No means of knowing the amount, but think I had about 100 tons piled in the yard.

Q. Where did you get it?

A. That I am unable to state very clearly. This I do know, that we selected some from the cinder brought from the Himrod Furnace in connection with quite a quantity of iron, and the balance that we had on hand at that time, I think, was taken from Brown, Bonnell and Company, and Himrod Furnace Company's cinder yards by our team, of which no account of weights or other particulars have been kept.

Q. At that time had you purchased any of this material from any one?

A. I don't remember; but don't think we had.

Q. Had you made any arrangement with Brown, Bonnell and Company to collect or take this material from their premises at or before that time, March 25th, 1873?

249 A. I don't think we had.

Q. Did you take it from their premises without first obtaining their permission?

A. When I say from Brown, Bonnell & Co.'s cinder yard', I mean the yards that have been filled with cinder by them, and not under their control. I never ordered any to be taken from Brown, Bonnell and Company's land without their permission.

Q. Whose yard to you refer to?

A. Our own yard has been partially filled by them. I think that my orders were to the teamster to collect it whenever he had permission.

Q. How much did you get out of your own yard?

A. I do not remember.

Q. When did you receive the quantity of iron you speak of from the Himrod Furnace, and what quantity did you receive?

A. We received it February, 1873. I can't tell the exact quantity—probably in the neighborhood of a ton.

Q. Were you quite satisfied with the experiment you made March 25th, 1873?

A. I was perfectly satisfied before that in my own mind.

Q. (Question repeated.)

A. Yes, sir.

Q. Are you positive you did make an experiment that day from which you produced somewhere in the neighborhood of a ton of pig-iron from

a quantity of the material of which you say you had previously collected about a hundred tons?

A. I demonstrated by practice that my opinion formed previously of the practicability and results were nearly correct.

250 Q. Did you make any pig-iron in your cupola furnace on the 25th of March, 1873?

A. Yes, sir.

Q. Did you make this pig-iron from furnace-runners?

A. Yes, sir.

Q. How do you fix the date so positively?

A. At about that time we had all the business that we could possibly attend to—other than making pig-iron, the 36 or 48 hours previous to the morning of the 25th, both night and day, I had all, or nearly all, employed in holding forcible possession of a section of railroad said to belong to the Liberty and Vienna Railroad Company, and as my moulders and other employees were not in laboring condition, I resolved to satisfy Mr. Stambaugh that my opinion was correct in regard to runners, and that I could do it without any loss of time to the foundry.

Q. What do you mean by saying that your foundrymen and workmen were not in a laboring condition on this occasion?

A. They had not slept the night previous, but had stood on the railroad track in the sleet and rain almost continuously from 24 to 36 hours. My opinion is that some of them may have been a little tight.

Q. Were the employees whom you have stated as being present and assisting in the experiment the regular employees connected with the foundry cupola?

A. Yes, sir.

Q. How long before this time had your cupola furnace been in operation for the purpose of making castings?

251 A. Since sometime in the month of February previous.

Q. You referred to memorandum before answering the question, did you not? Can you tell from that memorandum when this cupola furnace went into blast for the first time?

A. Yes, sir, I did; no, sir, I cannot.

Q. What time in February did you first use it for the purpose of making castings?

A. I cannot remember the exact date in February.

Q. Was it the first week?

A. I cannot tell.

Q. Was it the last week?

A. All I remember of the matter is that I promised my partner that I would move and make castings in the new foundry in February, 1873, and that I am certain I kept good my promise.

Q. Cannot you say about how long after the removal it was that you commenced to use this furnace?

A. We moved our small implements as soon as the foundry was ready for use, and made castings in two or three days thereafter.

Q. In your direct examination you state that subsequent to September 30th, 1873, when you commenced to work the furnace-runners in the cupola, that you used limestone same as you used it in melting pig-iron; afterwards increased the quantity and then reduced it again; do you now, in making up the burden of the furnace, determine the quantity of limestone to be used by the quantity of slag in the runners, or do you have a specific amount?

A. Latterly we have let the man who charges the cupola man-

252 agethat, and the result is that when we have a quantity of lime-

stone on hand he uses it freely, because the cinder gives the less trouble, being more fluid, and when we have but a small quantity he uses it sparingly, and has made pig-iron without a particle of limestone being put in any part of the charge.

Q. Then, with the addition of limestone, the furnace cinder operates more easily in a cupola furnace than without it?

A. I don't know that it does.

Q. Why do the workmen use it liberally when they have a supply of it, as you have stated?

A. Because it makes the cinder more fluid and is easier controlled in the spout.

Q. You have stated in your direct examination that you never have used any oxidized iron in connection with furnace-runners when making pig-iron from them in your cupola furnace; what do you do with the oxidized portions of this material; do you remove them from the balance before placing the material in the furnace?

A. I stated in my direct examination that I did not use oxidized iron in the manner and for the purpose mentioned in the specification referred to, but any oxidized iron that might adhere to the runners was not excluded.

Q. In your direct examination you were asked the following question: "At the time you smelted runners, in March, 1873, or at any time afterwards in the smelting of them, state whether or not you made them granular or spongy in any of the well-known ways
253 before placing them in a cupola, or whether or not in connection with them, or in a bed or strata under them, you used scrap or oxidized iron or scale or black oxide of iron in the cupola with them?" to which question you replied, "No, sir; I did not."

(The notary is here requested to verify the correctness of the above question and answer by reference to the record.

I have examined the record and find the above question and answer correctly quoted.

F. A. BUCHER,
Notary Public.)

Do you now wish to modify or correct this statement?

A. As I interpreted the question to be whether I introduced oxide into the cupola for the purpose of accomplishing any result I do not wish to amend it, but if the question meant that I carefully excluded all oxides that might adhere to the runners, I would say that I wish it modified in that way.

Q. Do you now say that you never used any oxidized iron in connection with furnace-runners in making pig metal from that material in a foundry cupola?

A. I put the material through the cupola to separate the metal'ic iron from everything else.

Q. (Question repeated.)

A. In using runners there is small quantities of oxidized iron adhering to it and is all put into the cupola together.

Q. What percentage is 50 pounds to 8 hundred pounds?

A. It is six and a quarter per cent.

254 Q. Do you think there is a greater or less per cent. of oxidized iron adhering to or in connection with ordinary furnace-runners, or have you any means of ascertaining definitely what percentage of the usual ordinary furnace-runner is oxidized?

A. In some runners when first taken from the furnace there would

be but a trace of oxidized iron adhering to them, but after having lain exposed to the atmosphere and weather they are more or less oxidized on the surface; although I may be able to make an estimate I have no means of knowing the exact amount.

Q. Have you ever used this material that was merely taken from the troughs or runners of a blast-furnace?

A. I used that that had been made but a few weeks previous.

Q. Where and when did you get them?

A. I got them from the cinder deposited at our foundry, and came from Himrod Furnace Company a few weeks previous to March 25th, 1873.

Q. Do you refer to those from which you made one ton of pig metal about that time?

A. Part of the runners of which I made the metal came from the Himrod Furnace Company; and I am not sure but all of them.

Q. Have you ever used any rusty scrap or other oxidized iron in the cupola furnace in connection with pig-iron for making castings of some kinds?

A. In making soft castings we sometimes use pig-iron which is more or less oxidized on the outside, and soft scrap which may have
255 been more or less oxidized in order to make castings.

Q. Do you know whether or not the presence of such oxidized metal had a tendency to increase the heat of the furnace?

A. I do not believe it does.

Q. Have you ever made any experiments with a view to test the effect of oxidized iron in this connection?

A. If you mean in connection with the melting of runners I say that I have not, but I would say that I have used old hot-blast pipe, grate-bars, &c., which were badly oxidized repeatedly, and the result was that the loss in the process of melting was larger than with ordinary pig-iron, and the iron taken from the cupola would not be near as hot or liquid as if we had used clean pig-iron or scrap.

Q. Do you know the chemical properties of oxygen, and whether or not heat can be produced in any way without the presence of this gas?

A. I am not perfectly informed in regard to all the properties of oxygen, but know its presence in some form is necessary to support combustion, part of the result of which is heat.

Q. Is it not true that the decomposition of oxygen is always accompanied with the production of heat?

A. I think that is true.

Q. Suppose that the presence of five or six per cent. of oxidized iron was in contact with the material of the furnace-runner, either from having been exposed to the elements or brought into contact by mixture or otherwise, and that the result would be an increase of heat when such material was exposed to the products of combustion of the
256 fuel and the blast in a foundry cupola, would such increase heat expidite the process of melting the iron from the slag of the runner?

A. If the presence of the oxide of iron would cause heat, I think that the only effect would be in the reduction of the amount of heat evolved by the presence of such material.

Q. You have stated in your direct examination that it only requires the application of heat and a small quantity of fluxing material to melt iron contained in these runners; if the oxide of iron were present as above stated and had the effect of increasing the heat, would it not thereby melt the iron from the runners more quickly than if left out?

A. If your cupola was heated to a certain degree, oxide of iron, if it would produce heat or anything else, introduced into the cupola to raise the temperature would accelerate the working of the cupola; any increase of the heat of the cupola will melt the runners quicker and separate the iron faster.

Q. You have stated in your direct examination that when the runners contained a large percentage of cinder additional fuel is required to melt them, is it not a fact that runners of this kind have usually less of oxidized iron adhering to the surface of them than when a greater proportion of the runner is composed of iron?

A. Yes. The oxidized iron of any amount adheres only to the metallic iron in quantities that amount to anything.

257 Q. Might not, then, the necessity for the addition of the fuel result from the lack of the sufficiency of oxide, supposing the latter to have the effect before referred to; that is, that the oxide had the effect of increasing the heat; and might not the necessity for increasing the fuel be obviated by adding a small portion of oxidized iron?

A. If the oxide increased the heat it would take the place of a proportionate amount of the fuel.

Q. You have described the difference between an ordinary blast-furnace and an ordinary foundry cupola to be that the walls of an ordinary foundry cupola are parallel, whilst the walls of the blast-furnace are built of an egg-shape. When you use the term parallel do you mean that the interior of the foundry cupola is cylindrical throughout its length?

A. The cupola proper is generally made in cylindrical form to the filling-door, and from that point to the top is sometimes made square and sometimes cylindrical.

Q. Is the foundry cupola you use built in this way?

A. Round throughout, but somewhat enlarged at the filling-door.

Q. Are there any boshes or outwardly inclined projections in the diameter of the furnace, between the hearth and the filling-door?

A. The cupola we are now using has projections on the inside.

Q. How can it be cylindrical and yet have an interior periphery of unequal diameter, like a furnace, referred to?

258 A. If I understand the term, cylindrical means a circular object or form of some length, whether of equal diameter or not; but cupolas when first built, as far as I have any knowledge, when of the ordinary kind, are built with the walls circular and parallel, vertically from the bottom to the filling-hole.

At this point adjourned till 9 a. m. to-morrow morning.

THURSDAY MORNING, *March 18th*, 1875.

Q. Are blast-furnaces used for smelting pig-iron from the ore constructed with boshes or an enlargement inclining outwards at a point above the crucible?

A. Yes, sir.

Q. What is the function of the boshes?

A. It serves, in my judgment, for two purposes; one it reduces the section of stock to be operated upon where the blast enters into the furnace, so that it can penetrate to all parts of the stock; the other purpose which it is said to serve is to sustain part of the weight of the stock.

Q. Can you reduce the section of the stock by increasing the diameter of the interior of the furnace?

A. An ordinary blast-furnace as built, if not contracted at the bottom, would be of too large section for the air to penetrate the center portion of material therein; increasing the diameter of the furnace does not decrease the section of the stock.

Q. Does it increase it?

A. Yes.

Q. Is not the furnace widest at the boshes?

259 A. Generally, but not always; I believe when first built.

Q. Do you know of any in the neighborhood any part of which is made larger than at the boshes?

A. I think that the Girard Furnace as first built was larger diameter above the boshes than at the boshes, and furnaces generally are made larger by the action of heat and material above the boshes than at that point, after being in use some time.

Q. Is not the object of the boshes of a blast-furnace to support and prevent the too rapid descent of the stock, and thereby afford time for the necessary chemical changes which take place within the stock?

A. In my opinion that is not the office it performs.

Q. Suppose it did perform that office and no other, would it be necessary to construct a foundry cupola upon the same principle?

A. There is no need of holding the material in a foundry cupola; it would not be necessary.

Q. Are there in fact boshes or an enlargement of the interior diameter of the foundry cupola at a point between the crucible and the filling-door, as such furnaces are constructed?

A. When first, as usually constructed, there is not.

Q. In your direct examination you say that prior to October 1st, 1873, the use of limestone as a fluxing material for melting furnace-runners in foundry cupolas was generally known amongst furnace and foundrymen and iron manufactures generally. Please mention some of the foundrymen who knew this fact prior to that time.

A. Mr. C. T. Medsker, foundryman; Mr. T. W. Kennedy,

260 who has been a foundryman; Mr. Cartwright, Mr. J. C. Kennedy, a furnace-founder; Joseph H. Brown, as a manufacturer of iron; Mr. Frederick Gerwig, Mr. William Tod, Owen Mulhaman, Frederick Krieckbaum, George Brilstein, and the hands employed at that time; some one or two dozen in all.

Q. How many of the persons named are not connected with or employed by the firm of Homer Hamilton and Company, or interested in the business of making pig-iron from this waste material in a foundry cupola?

A. Mr. D. C. Kennedy, Joseph H. Brown, James Cartwright, and Frederick Krieckbaum, who was, but is not now, employed by us.

Q. Do you know whether or not Mr. J. C. Kennedy had ever any experience prior to that time with a foundry cupola?

A. I don't know.

Q. Question repeated as to Joseph H. Brown.

A. I know that he has repeatedly examined my cupola when in operation.

Q. Did he see you melt furnace-runners before that time?

A. I do not know.

Q. How about James Cartwright?

A. I would not state positively as to the date referred to, but believe he witnessed the operation before that time.

Q. How many of the persons named knew of this fact prior to Sept.

30th, 1873, or prior to the time when you resumed operations in your foundry?

A. I don't know.

Q. How then can you say it was generally known that lime-
261 stone was used as a flux for melting furnace-runners in a cupola furnace prior to October 1st, 1873, when you do not know how many knew it prior to September 30th, 1873?

A. When we first melted the runners we done so but one day or part of a day, and made no exertions to publish the matter, and I do not remember distinctly all who may have been there that day, but on the day of September 30th, 1873, we resumed melting runners, and I distinctly remember of quite a number being there on that day and the day after, but cannot distinctly remember who they were.

Q. You state in your direct examination that you have means of knowing whether or not any chemical change takes place in material used in the foundry cupola; what means have you got of ascertaining this fact?

A. We weigh metali'c iron, and have weighed the coke, and weighed the metal'ic iron that comes out.

Q. Have you any other means than by weighing the material?

A. Never analized the product, but form my opinion by the weight and appearances.

Q. Is there any difference in the appearance and texture and chemical composition between the pig-iron which you put in the cupola and the castings which you take out?

A. There is.

Q. Is there any difference in the appearance, texture, and chemical combination between the material like Exhibit H. H. which you put into the cupola furnace and the pig-iron which you take out of it as product of such material?

262 A. Of course it is changed in form; the metal'ic iron would be somewhat finer grained and the cinder would be separated from the metal'ic iron and mixed with other cinder. There may be a slight chemical change in the substances which are contained in the iron. The cinder, I think, might be somewhat changed also.

Q. In your direct examination you say you think there is no chemical change effected in smelting the furnace-runners, and now you say there may be some chemical changes both in the iron and in the slag of which they are composed. Have you any definite opinion on the subject?

A. I know that when molten iron is encased in cinder and allowed to cool in that manner the texture is somewhat changed from what it would be could it be allowed to cool in sand in the ordinary manner, and I believe that if the metal'ic iron in runners after melting could be cooled under the same conditions the iron would be of the same quality. While there may be a chemical composition formed between the slag of the runner and the slag produced by the process, still I believe it amounts to nothing but a mere mixture.

Q. You say you have never made any chemical analysis by which you could determine these differences if any exist; have you ever had any analysis made by others or have you ever seen the report of any analysis by which you could determine definitely either the composition of the runner or of the metal produced from it?

A. No, sir; I have never seen or had any chemical analysis
263 made by another.

A. An ordinary blast-furnace as built, if not contracted at the bottom, would be of too large section for the air to penetrate the center portion of material therein; increasing the diameter of the furnace does not decrease the section of the stock.

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Q. You say you have never made any chemical analysis by which you could determine these differences if any exist; have you ever had any analysis made by others or have you ever seen the report of any analysis by which you could determine definitely either the composition of the runner or of the metal produced from it?

A. No, sir; I have never seen or had any chemical analysis
263 made by another.

Q. You say in your direct examination that the result of the use of bull-dog cinder if used in the foundry cupola would be that it would melt and mire with the product of the lime and fuel and come out of the cupola in that state. Have you ever tried bull-dog cinder in a cupola furnace?

A. I don't know that I have.

Q. How do you arrive at this conclusion, then?

A. By knowing that what is termed bull-dog cinder, the principle part of which is an oxide of iron, and that as it takes time to deoxidize oxide of iron and reduce it to metal'ic iron, and knowing there is not sufficient time for such reduction in an ordinary cupola.

Q. Do you know bull-dog cinder when you see it?

A. I don't know as I could always designate it by sight, but I call bull-dog cinder any cinder that would have a specific gravity nearly equal to iron and contain oxide of iron.

Q. Is the specimen before you, Exhibit H H, of nearly equal specific gravity as iron?

A. Part of it is, and part of it is not.

Q. Taken as a whole how does it compare with a piece of iron of equal size?

A. I should think between 15 and 20 per cent. of the weight of iron of the same bulk.

Q. Have you ever analized or seen the chemical analysis of bull-dog cinder?

A. I don't believe I have.

Q. Never having seen any analysis of either bull-dog cinder or the material before you, and not being certain that you can tell bull-
264 dog cinder when you see it, can you state definitely anything about the chemical construction or combination of either?

A. Not being a chemist I cannot state the exact per cent. of any material contained in runners or bull-dog cinder; but when I place runners in the cupola, without other iron, and obtain therefrom metal'ic iron, and when I see oxide of iron or ore placed in a blast-furnace and obtain therefrom a heavy, dark-colored mass, breaking with a glassy fracture, and obtaining no iron therefrom, I form my opinion as above stated.

Q. Does bull-dog cinder present a black appearance and break with a glassy fracture?

A. All that I ever examined is very dark, almost black, and breaks with a fracture not showing fibers or grains, or like a piece of anthercite coal.

Q. In your direct examination you say that if scrap-iron were used in connection with bull-dog cinder in a foundry cupola it would separate therefrom and fall to the bottom, but if scale or black oxide of iron were used it would mix with the product of the cupola. If you have never tried it how do you know this would be the result?

A. My knowledge of the attraction of gravitation leads me to this conclusion.

Q. In the same connection you say that if small pieces of malleable iron are used they would become oxidized and mix with the mass. Suppose large pieces of malleable iron were used what would be the result?

265 A. As soon as it becomes heated above a cherry-red temperature the outside of the piece would be changed into black oxide of iron, and as long as it remained at a heat above that the oxidation would continue until it was entirely consumed or reduced to black oxide, but should it be immersed in a bath formed of these oxides of iron,

so as to exclude the oxygen of the atmosphere, I cannot say what the result would be, but think it would remain unchanged in that position for some length of time.

Q. Have you ever tried to melt malleable iron in a cupola furnace?

A. I have not alone.

Q. Have you ever done it with other materials?

A. Sometimes small portions get in with other iron by mistake.

Q. You have said in your direct examination that it would be impossible to make pig-iron or castings in a foundry cupola from the slag or refuse of blast-furnaces, excluding furnace-runners. How about salamander, so called? Can you make pig-iron from them in a cupola furnace?

A. Yes, sir; I think I could.

Q. Could you from the material that has been called kettle-bottom?

A. I have no distinct knowledge of them.

Q. Do you consider yourself a good business manager in the foundry business?

A. That is not my business. I am a mechanical engineer and superintendant.

Q. Do you purchase pig-iron and other material you use in the furnace?

266 A. Although we have one member whose business it is to make the purchases, I sometimes do it.

Q. You state in your direct examination that you purchased pig-iron in which there would be one-fourth of the bulk of some of the pigs furnace cinder. What proportion would these pigs bear to the whole quantity purchased?

A. They would be sometimes three or four pigs in a car-load; sometimes none at all.

Q. Did you return them, or what did you do with such pigs?

A. I generally received the iron from my customers, and said nothing about it; but it is customary at some places to return them.

Q. When you are very busy in foundry work how much pig-iron do you ordinarily use per week?

A. It depends on the quality of the work; from 15 to 30 tons per week.

Q. How much pig metal can you make from these furnace-runners in your cupola furnace—say, working 24 hours?

A. In running about 6 hours per day, as has been our custom, we melted runners enough to make from 40 to 60 tons of pig-iron.

Q. About how long did you take to make the small quantity you say you made in March 25, 1873?

A. I don't remember the exact time, but think between 1 and 3 hours' use of cupola after the blast was put on.

Q. What was the value of pig-iron in the spring of 1873?

A. I can't remember.

Q. Mr. Kennedy, a witness whose deposition was taken immediately before yours, said it was worth somewhere in the neighborhood

267 of $50.00 to $55.00. Do you think that would be about the value of it about the time you made this experiment?

A. Some classes of iron may have been worth that at that time.

Q. You say you were very busy at that time, March 25th, 1873, in your foundry. Were you using about the amount you have stated that you do use when busy?

A. I think so.

Q. About how much pig-iron did you purchase between March 25th, 1873, and Sept. 30th, 1873?

A. I can't arrive at any conclusion without looking at my books; can do so.

Q. Did you receive any written notice or letter signed by A. McCallum, attorney for John J. Vinton, notifying you that you were infringing his patent? If so, state when you received it.

A. We received a note of that character, and it having been mislaid I cannot give the date.

Q. In one part of your testimony you say you procured a quantity of this material from cinder which you were hauling in order to fill up your yard; and in another place you state that you obtained a quantity from a yard of yours which had previously been filled with cinder by the Himrod Furnace. Is this one and the same yard or different yards you refer to?

A. We have two yards; our lower yard was filled with cinder from the Himrod Furnace. Our new yard was principally filled with rolling-mill cinder or ashes; what furnace cinder used at our upper or new works was mostly used against the buildings and walls.

268 Q. The cinder which you used in whole or in part, as you have testified, for the purpose of making the experiment, March 25th, 1873, was that dug from the yard of your old foundry and carried to the new one?

A. I did not say I made an experiment on the 25 of March, 1873; I did not acknowledge in my testimony that I made an experiment. I am very sure that part of the material I used that day was selected from the cinder that came from the Himrod Furnace, and I am not certain that any of it came from the lower yard, but think some of it did.

Q. How much cinder did you dig from the old yard and carry to the new *old*, and when did you do it?

A. I can't tell the amount; have no means of knowing.

Q. Did you ever dig or cause any to be dug from your old yard and carried to your new one?

A. Yes, sir.

Q. When was it that you did this?

A. The first we dug was inside of a year from this time; but one teamster had hauled what was on the surface of the yard before that.

Q. How long before this time last year had your teamster hauled this material from you' old foundry to your new one?

A. I think he hauled some of it before the 25th of March, 1873.

Q. Will you state positively that he did?

A. Not from memory.

Q. Where was this 100 to 150 tonsp iled prior to March 25th, 1873; in your new or old yard?

A. It was piled in our new furnace-yard, near the south end of the foundry, between the south end of the foundry and the railroad.

269 Q. Was Mr. Stambaugh present when you made this experiment or practical test, or first made iron from the runners, March 25th, 1873.

A. When I first melted runners alone Mr. Stambaugh was not present.

Q. Is Mr. Meadsker, Mr. Krieckbaum, and Mr. Mulhamen still in your employ?

A. Mr. Meadsker and Mulhamen are; Mr. Krieckbaum is not.

Q. Did you at this time, or at any time between the 25th of March, 1873, and the 18th of September, 1873, publish or cause to be published

in any magazine, newspaper, book, or other printed publication any account or description of your doings with this refuse material which you call furnace-runners?

A. No, sir; I did not.

Q. Did you file any caveat or application for letters patent in the United States Patent Office describing the process by means of which you made pig-iron of this material?

A. No, sir; I did not.

Q. You state that you made an agreement with Mr. Kennedy in regard to making iron from this material; is that agreement still in force?

A. I made a verbal agreement, and it is still in force; I consider it so.

Q. Does Mr. Kennedy receive, or has he received, any of the profits made in this business?

A. He was to receive a portion of the profits, but has received nothing as yet.

Q. Is he to contribute to the expense of this suit?

A. We have had no conversation on the matter as regards the expenses of the suit.

270 Q. You state you have seen clay used as part of the material employed in blast-furnaces; where did you so see it used?

A. I seen it so used at one time at the Himrod Furnace Company.

Q. Can you state the time?

A. I think it was several years ago.

Q. What was it used for?

A. He told me for flux.

Q. Do you know the chemical constituents of lime?

A. No, sir.

Q. Do you know whether it acts chemically or mechanically upon the other materials used in a blast-furnace?

A. I cannot define the exact action of it.

Q. Do you know whether or not it increases the heat?

A. I know that it does; that is in a blast-furnace.

Q. Do you know whether or not it increases the heat in a cupola furnace?

A. I do not; but think it does not increase it.

Q. Have you taken out letters patent for inventions or discoveries made by you?

A. Yes, sir.

Q. You say in your direct examination that you are well-enough informed in the fundamental principles of the patent laws to form an opinion as to the patentability of a discovery, invention, or improvement in art. *Q.* What is fundamental principles of the patent law according to your information?

(Objected to by counsel for defendants.)

A. The fundamental principles or objects of the patent laws is to aid the inventor in getting some benefits of any useful improvement he may have made.

271 Q. Is it not rather a contract between the public and the inventor, the consideration being that the inventor shall make known his discovery so that the public at large may be benefitted thereby after the expiration of the exclusive privilege granted to the patentee, which exclusive privilege is the consideration on the part of the public?

(Objected to by counsel for defendants.)

A. Your statement is part of the object of the patent law, but the fundamental principles as I understand it is really to repay a person for any benefit he may be to the public by any useful invention he may make.

Q. Is it true that prior to October 1st, 1873, that a large percentage of good metal'ic iron was thrown away with the slag?

A. There was a percentage thrown away at all furnaces in the slag.

Q. Is it true that the slag of the blast-furnace which contains this metal'ic iron is of a general greyish color when cool?

A. The slag which surrounds this globule of iron is of a bluish or greyish color.

Q. Is the material which you have been using in your cupola furnace of comparatively great specific gravity?

A. A part of it is.

Q. Do these furnace-runners, in fact, contain a large percentage of good metal'ic iron, often as great as the amount of metal produced from the ore in the process of smelting?

A. In some cases they do.

Q. In your opinion, would an inventor who increased the production of iron from the same amount of ore be a meritorious inventor?

A. Yes, sir.

Q. Have you increased the production of iron by collecting
272 and melting this waste material in your cupola furnace?

A. No, sir.

Q. Have you made any pig-iron from material which was previously thrown out by blast-furnace men and has since been dug out of cinder piles and used as you have stated in a cupola furnace?

A. We have dug metal'ic iron from cinder piles, melted it, and cast it into pigs.

Q. Have you done so with the material called furnace-runners?

A. We cast the metal'ic iron contained in furnace-runners into pigs.

Q. Do you employ a cupola furnace for this purpose?

A. Yes, sir.

Q. Do you first break them into pieces before putting them into the furnace?

A. We do when in two large pieces to handle.

Q. Do you place in the cupola a bed of coke or other suitable fuel before you put in the broken runners?

A. Yes, sir.

Q. Do the runners which you ordinarily use have a percentage of oxidized iron attached to their surface, or otherwise forming a part of them?

A. Sometimes they have, caused by the action of the atmosphere, a small percentage of oxidized iron, and sometimes they have none.

Q. I think that you have stated that sometimes portions of scrap-metal, or metal similar to scrap-metals, is formed in the cinder dump where the runners are found; is this correct?

A. There have been small and large pieces found in cinder
273 dumps. I have known of whole pigs, weighing over 100 pounds each, being found in the cinder dump.

Q. Have you ever used any of this material in connection with runners in the foundry cupola?

A. In case we wish to make castings, we sometimes mire soft pig-iron with the runners. In making pig-iron we selected larger pieces of scrap, and there may have been occasionally a small piece of scrap go in with the runners.

Q. Have you used a small quantity of lime in connection with these runners?

A. We have sometimes used a small quantity, sometimes a large quantity, and sometimes none at all.

Q. After you have placed the materials mentioned, do you ignite the fuel in the cupola and subsequently turn on the blast to the full?

A. I think we ignite our cupola before any of these materials are put in, introducing before them a small quantity of wood and igniting that.

Q. Do you turn on the blast to the full before you put in the material to be melted?

A. We sometimes do.

Q. Do you always do it?

A. I don't know.

Q. Do you have any provision for the passage of slag from the furnace?

A. When we first melted it we had nothing but the ordinary tuyerp hole, and afterwards we had a hole for the purpose of letting off the slag and cinder.

Q. Have you noticed if there is much sulphor in the iron you make in this way?

A. I have not noticed more than from some pig-iron I have
274 melted.

Q. Did you ever try to desulpherize the iron by the use of oxide of manganese, or other material having an af'inity for sulphur, by blowing it through the tuyeres?

A. No; I never have.

Q. Do you run the iron you make into moulds or pig-beds, so as to form pigs?

A. I run the iron I melt into pig-beds sometimes.

Q. I now place a specimen before you, and ask you to look at it without handling or touching it, and ask you to say, if you can, what description of cinder it is.

(Objected to because not cross-examination, and for the reason that the witness is not permitted by the question to properly examine the material by counsel for defendants.)

A. It is necessary, to more clearly determine the nature of a cinder, to see it as it is deposited at the furnace; or, what I mean to say, to see the surface and the whole strata, in order to determine by the eye alone the nature of cinder. The piece that you have presented to me is not of sufficient dimention for me to arrive as near a conclusion as I otherwise could. The specimen before me, I think, is not what is usually termed bull-dog cinder, but a cinder composed of a small percentage of iron, and was not produced when the furnace was in the very best condition.

Q. Can you say, from its appearance, whether it is cinder of puddling-furnace or of a blast-furnace, or of a foundry cupola?

(Objected to on above ground by counsel for defendants.)

275 A. My cupola has produced cinder in appearance similar to that, and I cannot tell if it were produced from any one of those sources.

(Said specimen is offered in evidence, marked "Exhibit H. H. 1, March 18th, 1875, defendants' testimony," to which counsel for defendants objects.

Q. (Witness is here shown another specimen, marked "Exhibit H. H. 2, March 18th, 1875, defendants' testimony," and asked to look at it

under the same conditions, and say if he can tell what kind of cinder it is.

Objected to because not cross-examination, and for the reason that the witness is not permitted by the question to properly examine the material by counsel for defendants.)

A. The difficulty of judging of this specimen is the same as before al'uded to, and that would be in deciding between the inside of an apple or pear after the surface had been removed; but would say, as near as I can form an opinion, this material is sand or stone in which globules of iron have been deposited and cemented together at a high temperature.

Q. About what percentage of iron, if any, is contained in this specimen?

(Objected to by counsel for defendants.)

A. I don't know.

Q. (Witness here shown another specimen, marked "Exhibit H. H. 3, March 18th, 1875," under the same conditions, and asked to state, if he can, what description of cinder it is.

Objected to by counsel for defendants for the same reasons as before given.)

A. I can't form a close conclusion on account of the size, for reasons before stated by me, but think it is an ordinary cinder, with a
276 small percentage of oxide of iron in it, but scarcely any metal'ic iron.

Q. Can you say what percentage of iron is contained in this last specimen?

(Objected to by counsel for defendants.)

A. I cannot state.

Q. How will it compare with the specimen H. H. 2?

(Objected to by counsel for defendants.)

A. H. H. 2 would have the most iron in it.

Q. What difference in the percentage of iron is there, in your estimation, in these two last exhibits, H. H. 2 and H. H. 3?

(Objected to by counsel for defendants.)

A. I believe, from appearances, that there is more iron in H. H. 2 than in H. H. 3.

Q. Do you think there is a large percentage in either of the specimens?

A. H. H. 2 has evidently been broken while hot, which disguises it somewhat, but from appearances I would judge the percentage was quite large. It has globules of metal'ic iron on the surface.

Q. (Witness here shown specimen marked "Exhibit H. H. 4, March 18th, 1875," and asked to examine it without the conditions above referred to, that is, without handling or touching it, and asked to state, if he can tell, what it is.

Objected to by counsel for defendants.)

A. It is cinder and iron mixed.

Q. What percentage of oxidized iron do you suppose it contains?

A. From appearances it contains from one to five per cent.

Q. (Witness here shown specimen marked "Exhibit H. H. 5 and Exhibit H. H. 6, defendants' testimony," and asked if he can
277 tell what material they are, either by sight or by handling.

Objected to by counsel for defendants.)

A. As I before stated, the exterior of the material before being broken aids in determining the quality of the material, and as in several processes the manufacture of iron material is produced very similar in ap-

pearance and quality to those two specimens, I might be mistaken in my judgment, but I am of the opinion that Exhibit H. H. 5 is non-separated material from a blast-furnace, and Exhibit H. H. 6 may be slag from a heating or puddling furnace.

Q. (Witness shown specimen marked "Exhibit H. H. 7, March 18th, 1875," and asked to examine it, and state if he knows what it is.

Objected to by counsel for defendants.)

A. This appears to be metal'ic iron, nearly fibrous, with globules of iron cemented together, with slag adhering to it.

Q. (Witness shown specimen marked "Exhibit H. H. 8, March 18th, 1875," and asked if he knows what it is, and how it is produced.

Objected to by counsel for defendants.)

A. That is furnace slag upon which water has been thrown while in a molten state.

Re-examination:

Q. State whether or not you meant to say in your cross-examination that you could detect metal'ic iron in the slag which held together the globules of iron in furnace slag, or whether the iron you referred to was the globules themselves held in mixture with the slag.

A. It was the globules of iron I could detect.

278 Q. What application of any means or force or thing that *that* was new or unknown to you did you make in the smelting of the runners on March 25th, 1873, at you' foundry?

A. Nothing that was new or previously unknown to me.

Q. State whether or not prior to that time you had been familiar with foundry cupolas.

A. I had.

Q. Did you know at that time and prior thereto they were operated with cold blast?

A. Yes, sir.

Q. State whether or not you knew prior to that time that furnace-runners contained metal'ic iron.

A. I did.

Q. State whether or not you knew at that time and prior thereto that limestone was used as a fluxing material.

A. I did.

Q. State whether or not you knew at that time and prior thereto that coke was used as fuel in foundry cupolas.

A. I did.

Q. State whether or not you knew at that time and prior thereto that metal'ic iron could be melted in a foundry cupola by the application of cold blast, coke as fuel, and limestone as fluxing material by putting metal'ic iron and coke and limestone in alternate layers in the cupola, igniting the fuel, and putting on the blast to the full, and that you could run metal'ic iron when melted into sand moulds known as pig-beds.

A. I did.

279 Q. In applying the above specified operation, state whether or not you added any, and, if so, how much, to the quanity of metal'ic iron that existed in the world?

A. I don't believe I added any. I did not add any.

Q. In what way, in your judgment, would it be possible by the operation of melting metal'ic iron to add anything to the quantity of metal'ic iron?

A. It would be impossible.

Q. Do I understand you to say in your cross-examination that in melt-

ing runners at your foundry you did not scrape off or cause to be removed in some way the oxide of iron which adhered to the runner before melting them?

A. No, sir; I did not remove it.

Q. State whether or not you frequently find this oxide of iron adhering to pig-iron when used in foundry cupolas.

A. I do.

Q. State whether it so adhered, to your knowledge, to either pig-iron or runners previous to the date of Mr. Vinton's patent, or whether it has commenced to do so only since that time.

A. Whenever metal'ic iron is exposed to dampness and the atmosphere, the oxygen of the atmosphere unites with it and forms an oxide which adheres to the surface of the iron; the same has been the case ever since metal'ic iron was made and oxygen was contained in the atmosphere as alluded to.

Q. State whether or not it is possible in the ordinary use of metal'ic iron in foundry cupolas to remove the oxide before using the iron.

A. It would not be practicable.

At this point adjourned till 9 a. m. to-morrow morning.

280 FRIDAY MORNING, *March 19th*, 1875.

Q. Why did you not, after you ascertained that you could make pig-iron from furnace runners, as you have stated in your direct examination, and after actually doing so, March 25th, 1873, apply for a patent for the process of doing it?

A. Because I considered it no invention and not patentable.

Q. Suppose a process were discovered to extract the iron (if any there be) in the slag proper that holds iron in chemical form, but not in the metal'ic form, what would you say as to that being new and entirely different from any process of extracting metal'ic iron existing in a mechanical form in trough-runners?

A. If a new process were discovered to extract iron that is chemically contained with other substances from ordinary furnace cinder it would be new, and entirely different from the process of extracting metal'ic iron from furnace-runners.

Q. State what aid would be afforded in any manner whatever in the known method or process of resmelting furnace slag, containing iron chemically combined, by using while resmelting it any of the oxides of iron mentioned in the specifications to which you referred yesterday.

A. I think it would be no aid and possibly a detriment.

Q. Why did you melt a quantity of this material in March, 1873, and then do nothing more at it till September, 1873?

281 A. Previous to March 25th, 1873, I had directed the collecting at our works of a quantity of this material at an expense to the firm; several times previous to the date spoken of, at intervals of say about one week, Mr. John Stambaugh, who is a member of the firm, talked to me in regard to being able successfully to separate the metal'ic iron from the runner, and thought before investing too much money I had better make a practical demonstration; several times I refused to do it, because it would occupy our time, which was very much taken up with other business, and I was satisfied as to the result what it would be. Sometime before the date spoken of I met Mr. Stambaugh and he told me in a short way that if I conveniently could I ought to demonstrate the matter to him in any way he wished. I thereafter, when the first opportunity occurred, melted the material of the runners to demonstrate to him what I had told him before, and my opinion was so near

right that I came very near in my previous estimation of what quantity of metal'ic iron there was present in the material.

Recross-examination:

Q. In your re-examination you state that what you meant by saying in your direct examination that it was the globules of iron and not metal'ic iron which you could detect in the slag of the furnace-runners; do you mean to say that you cannot detect metal'ic iron in said runners unless it is in the globular form you have mentioned?

(Objected to by counsel for defendants upon the ground that nothing new has been called for or elicited in the re-examination of this witness, and further objected that witness in his re-examination, did not say that he could not detect metal'ic iron in runners.)

282 A. I can detect metal'ic iron when in other forms.

Q. Then please explain what you mean by the following question and answer, the same being the first question and answer of your re-examination: "State whether or not you meant to say in your cross-examination that you could detect metal'ic iron in the slag which held together the globules of iron in furnace slag, or whether the iron you referred to was the globules themselves held in mixture with the slag? A. It was the globules of iron I could detect;" said question and answer being the first of your re-examination.

(Question objected to by counsel for defendants on the first ground of objection to former question.)

A. In runners, as they come from the furnace, the variation and condition of the metal'ic iron is considerable. In some instances the globules of metal'ic iron are very nearly in contact with each other, only held together by almost infinitely small particles of slag, so that when breaking the globules of iron that may be locked together are parted, showing the exact quality and grain of the metal'ic iron. In other cases the globules are deposited some distance apart, and when fractured the cinder, being less tenacious, parts, showing the globules of iron coated by a thin layer of slag; in other cases the bottom of the runner when broken shows iron without being separated by cinder, while other portions of it may be composed of either or both of the formations alluded to.

Q. Witness is asked if he can now produce the statement show-
283 ing the amount of runners collected by the defendants and the amount of pig-iron made therefrom, as referred to in his cross-examination.

(Objected to by counsel for defendants.)

A. (Witness here produces statement marked "Exhibit H. H. 9, March 19th, 1875," hereto attached.)

Q. You state in your re-examination that you did not apply for a patent for the process of making pig-iron from the furnace-runners for the reason that you considered it no invention and not patentable; did you form this opinion from your own judgment or because of information received from others?

(Objected to by counsel for defendants.)

A. I formed my opinion by knowing that they had been used for the purpose of making pig-iron in connection with other material a long time ago.

Q. In your re-examination you say that you directed the collection of a quantity of this material at your works previous to March 25th, 1873. State whether or not you did not also direct the parties collecting it to say to any one who should inquire what they were going to do with it,

that you were going to use it for other purposes than making iron therefrom.

(Objected to by counsel for defendants on above grounds.)

A. When I first talked to Mr. Degan in regard to hauling the material, he said there were a great many teams in town, and he wished to have a steady job, and said that he wished I would give him one. I told him that if he would collect and deliver runners to me at a stated price per ton that I would furnish him employment so long as he furnished me runners. He said, "As soon as others learn that you want
284 them, all teams will haul and my job will be gone; what shall I tell them when they ask me what I am doing with them?" I told him that it was nobody's business but his own what he was doing with them, and he might say, if he wanted to, that they were for filling lots, building walls, or anything else he pleased. I don't remember of giving any distinct instructions to any one else about the matter.

HOMER HAMILTON.

Also AUGUSTUS B. CORNELL, a witness called on behalf of defendants, being duly sworn as hereinafter certified by me, testified as follows:

Question. (By counsel for defendants.) State your name, age, and place of residence.

A. Augustus B. Cornell; 45; Youngstown, Ohio.

Q. State how long you have been engaged in the business of manufacturing pig-iron, or connected with that business, and where.

A. Fifteen years, at the Himrod Furnaces in this town.

Q. In what capacity?

A. First as bookkeeper, then as treasurer of the company. I hold that office now, but with general charge of the business.

Q. State what you know, if anything, as to the nature and material composing what are known among furnace men as trough-runners of blast-furnaces.

A. They are composed of a mixture of cinder and globules of iron ordinarily.

Q. Iron in what form?

285 A. In the same condition as in pig-iron.

Q. State what you know, if anything, as to the use of this material for purposes of resmelting in blast-furnaces.

A. We have been accustomed to use them for the last two years.

Q. For how long have you known the fact that this material contained metallic iron in the form you have stated?

A. For a great many years; for a long time before that—before we commenced its use.

Q. For how long have you known that they could be resmelted in blast-furnaces?

A. Have been well satisfied of it ever since my attention was called to their composition.

Q. State what you know, if anything, and for how long, as to the application of cold blast for the purpose of operating blast-furnaces, either personally from reading or conversation with others.

A. My information is that the use of cold blast was the original mode of making iron, and practiced solely until a comparatively recent period, and is still practiced to some extent.

Q. State what you know with regard to what material has ordinarily been used in the operation of blast-furnaces, during your experience, for fluxing material.

A. Limestone.

Q. State what knowledge you have, if any, as to the use of ordinary coke for fuel in a blast-furnace.

A. Coke made from good coal is very largely used, and is very good fuel.

Q. State, then, what there was either new or not generally known among iron-manufacture's prior to March 1st, 1873, as to the
286 smelting of iron material by the application of cold blast, coke as fuel, and limestone as fluxing material.

A. I think all those substances and their application were fully and generally known at that time.

Q. State what more is necessary or required, if anything, in the remelting of furnace-runners or scrap-iron than the application of sufficient heat for that purpose, in order to extract from them the metal'ic iron they contain.

A. I think it would ordinari*a*lly require a little additional flux to liquify the cinder, so far as the runners are concerned.

Q. In the resmelting of these furnace-runners in an ordinary blast-furnace, what chemical change, if any, takes place in the materials of which the runners are composed during the process?

A. None ordinari*a*lly.

Q. Are you familiar with the mode of construction of ordinary foundry cupolas?

A. I have not been familiar with them for 20 years past.

Q. Were you before that date?

A. I was.

Q. Suppose that the ordinary foundry cupola was constructed on the same model, in its interior shape, as the ordinary cupola blast-furnace stack, and that furnace-runners were melted in it by the application of cold blast, with the use of coke as fuel, limestone as fluxing material, what would then be either new or generally not known in the application of those forces and principles, and what difference would there be in the melting of runners in that way, either in process or prin-
287 ciple, and the melting of the same material in blast-furnaces, excepting that in the latter case hot blast is applied, and in the former cold blast?

A. Nothing new. The difference in process would be that it is on a smaller scale; no difference in principle.

Q. When, if ever, did you first learn that these furnace-runners were being melted in foundry cupolas?

A. I think it was the fall of 1872 or the winter of 1872–'73.

Q. Please state how you learned it, and substantially what you learned.

A. I learned from common rumor, as far as I can state now, that Homer Hamilton & Co. were making pig-iron from them in their cupola.

Q. State whether, at or about that time, you were using these runners for the purpose of remelting at the Himrod Furnaces.

A. I don't think we were when I first learned, though I am not certain.

Cross-examination:

Q. Are you familiar enough with the appearance of furnace-runners, and material of which they are composed, to know them when you see them?

A. I know about how they ought to look.

Q. (Witness is asked to look at certain specimens, and point out which is furnace-runner.

that you were going to use it for other purposes than making iron therefrom.

(Objected to by counsel for defendants on above grounds.)

A. When I first talked to Mr. Degan in regard to hauling the material, he said there were a great many teams in town, and he wished to have a steady job, and said that he wished I would give him one. I told him that if he would collect and deliver runners to me at a stated price per ton that I would furnish him employment so long as he furnished me runners. He said, "As soon as others learn that you want
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Q. State what you know, if anything, as to the use of this material for purposes of resmelting in blast-furnaces.

A. We have been accostomed to use them for the last two years.

Q. For how long have you known the fact that this material contained metal'ic iron in the form you have stated?

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A. Have been well satisfied of it ever since my attention was called to their composition.

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Q. In the resmelting of these furnace-runners in an ordinary blast-furnace, what chemical change, if any, takes place in the materials of which the runners are composed during the process?

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Cross-examination:

Q. Are you familiar enough with the appearance of furnace-runners, and material of which they are composed, to know them when you see them?

A. I know about how they ought to look.

Q. (Witness is asked to look at certain specimens, and point out which is furnace-runner.

Objected to be counsel for defendants because not cross-examination.)

A. (Witness states that "Exhibit H. H. 2, March 18th, 1875," is a proper runner.)

Q. How is it with regard to "Exhibit H. H."?

(Objected to on above grounds by counsel for defendant.)

288 A. I can't tell what it is with certainty.

Q. You have stated in your direct examination that you have been accustomed to use furnace-runners for the purpose of resmelting them in your blast-furnace for the last 2 years; what did you do with them prior to that period?

A. They were thrown away or put into walls.

Q. Do you know whether it is customary or usual to use coke in connection with cold blast in smelting iron from the ores in a blast-furnace?

A. I think the cold-blast furnaces are charcoal furnaces usually, perhaps always.

Q. You have stated in your direct examination that it was fully and generally known prior to March, 1873, that the smelting of iron material by the application of cold blast, coke as fuel, and limestone as fluxing material was generally known among iron-manufacturers; do you wish so to be understood?

A. I do.

Q. Please explain how have you arrived at this conclusion, when you also state that you also believe that charcoal is usually and perhaps always used in the cold-blast furnace.

A. I arrive at it on the supposition that a piece of hot iron will burn your fingers just as certainly when heated with coke as when heated with charcoal.

Q. Can you state definitely whether or not pig-iron has been smelted from the ore in a cold-blast furnace, with coke as fuel?

A. I cannot.

289 Q. In using these furnace-runners in your blast-furnaces, state how you used them, whether by themselves or mixed with ore, proper fuel and fluxing material being also added.

A. We use them mixed with ore, but in different charges.

Q. What proportion of runners do you use compared with the ore in the stack at one time?

A. According to circumstances, the highest amount, I should say, was one-third of the iron-making material.

Q. In direct examination you say that you are, or have been, familiar with the construction of the foundry cupola. Can you state briefly wherein consists the difference between an ordinary foundry cupola and an ordinary blast-furnace? If yea, please do so.

A. The blast-furnace has what are called boshes, which the foundry cupola has not.

Q. What is the object or office of the boshes of the blast-furnace?

A. I suppose, to retard the downward progress of the stock and concentrate the stock into a smaller circle, so that the blast can reach the whole of it.

Q. In so retarding the descent of the stock, is not sufficient time afforded for the necessary chemical changes which take place in the stack, and do not *in* the boshes, therefore, aid the process in this way?

A. I say, as I said before, it affords time for the changes which do take place, but not always for all which should take place, a large furnace doing it more effectually than a small one.

Q. In the operation of an ordinary foundry cupola is there any necessity for retarding the descent of the stock as in a blast-furnace?

A. Not the same necessity.

290 Q. In your opinion is there any difference in the chemical effect between the hot blast and the cold blast?

A. I am not certain that there is. I don't know that there is.

Q. Is there any difference in the quality of the iron produced by the cold blast and the hot blast?

A. Cold-blast iron is reputed to be stronger iron.

Q. Is there any difference in the market value of the hot-blast and cold-blast iron; and, if there is, please state what that difference is?

(Objected to by counsel for defendants.)

A. Cold-blast iron usually brings the higher price.

Q. The effect or result of cold blast being different in this respect from the effect of the hot blast, do you think the same cause can produce these different effects?

A. I am not certain that the effect is decidedly different.

Q. If a different quality of iron is produced in the cold-blast furnace from that produced in the hot-blast furnace, is not the effect or result of the operation of these different kinds of furnaces different?

A. Yes.

Q. Is not the material called furnace-runners longer retained in and exposed to the action of the products of combustion in the blast-furnace than they would in a foundry cupola?

A. Yes.

Q. Can you say with certainty whether this fact would or would not cause some difference in the product of such material when used in these different furnaces?

291 A. I can say with certainty that it would have no effect.

Q. You have said that you never used this material by itself in a blast-furnace, that is, without ore in the furnace at the same time. Have you ever used it in a foundry cupola in any way?

A. I never have.

Q. Referring to specimen "Exhibit H. H.," can you state whether or not, in your opinion, there would be any chemical change necessary to reduce the metal therein by an ordinary blast-furnace to the condition of pig-iron?

A. I don't think there would.

Q. Are you sufficiently familiar with the operation of the foundry cupola to say whether or not there is any change in the nature and quality of the iron which is put into said furnace as pig-iron and comes out in the shape of castings?

A. Slight mechanical changes.

Q. Do you say that there is no chemical change takes place in metal'ic iron when passed through a foundry cupola in this way?

A. The best authorities maintain there is none.

Q. Question repeated as to furnace-runners, or the material about which you have been testifying.

A. I think not.

Q. You state that you first learned of such use being made of this material in the fall of 1872 or winter of 1872–'73, and that Homer Hamilton and Co. were then engaged in that business. Have you any personal knowledge in the matter?

A. I have not.

292 Q. By what circumstances, if any, do you fix the time as you have done?

Objected to be counsel for defendants because not cross-examination.)

A. (Witness states that "Exhibit H. H. 2, March 18th, 1875," is a proper runner.)

Q. How is it with regard to "Exhibit H. H."?

(Objected to on above grounds by counsel for defendant.)

288 A. I can't tell what it is with certainty.

Q. You have stated in your direct examination that you have been accustomed to use furnace-runners for the purpose of resmelting them in your blast-furnace for the last 2 years; what did you do with them prior to that period?

A. They were thrown away or put into walls.

Q. Do you know whether it is customary or usual to use coke in connection with cold blast in smelting iron from the ores in a blast-furnace?

A. I think the cold-blast furnaces are charcoal furnaces usually, perhaps always.

Q. You have stated in your direct examination that it was fully and generally known prior to March, 1873, that the smelting of iron material by the application of cold blast, coke as fuel, and limestone as fluxing material was generally known among iron-manufacturers; do you wish so to be understood?

A. I do.

Q. Please explain how have you arrived at this conclusion, when you also state that you also believe that charcoal is usually and perhaps always used in the cold-blast furnace.

A. I arrive at it on the supposition that a piece of hot iron will burn your fingers just as certainly when heated with coke as when heated with charcoal.

Q. Can you state definitely whether or not pig-iron has been smelted from the ore in a cold-blast furnace, with coke as fuel?

A. I cannot.

289 Q. In using these furnace-runners in your blast-furnaces, state how you used them, whether by themselves or mixed with ore, proper fuel and fluxing material being also added.

A. We use them mixed with ore, but in different charges.

Q. What proportion of runners do you use compared with the ore in the stack at one time?

A. According to circumstances, the highest amount, I should say, was one-third of the iron-making material.

Q. In direct examination you say that you are, or have been, familiar with the construction of the foundry cupola. Can you state briefly wherein consists the difference between an ordinary foundry cupola and an ordinary blast-furnace? If yea, please do so.

A. The blast-furnace has what are called boshes, which the foundry cupola has not.

Q. What is the object or office of the boshes of the blast-furnace?

A. I suppose, to retard the downward progress of the stock and concentrate the stock into a smaller circle, so that the blast can reach the whole of it.

Q. In so retarding the descent of the stock, is not sufficient time afforded for the necessary chemical changes which take place in the stack, and do not *in* the boshes, therefore, aid the process in this way?

A. I say, as I said before, it affords time for the changes which do take place, but not always for all which should take place, a large furnace doing it more effectually than a small one.

Q. In the operation of an ordinary foundry cupola is there any necessity for retarding the descent of the stock as in a blast-furnace?

A. Not the same necessity.

290 Q. In your opinion is there any difference in the chemical effect between the hot blast and the cold blast?

A. I am not certain that there is. I don't know that there is.

Q. Is there any difference in the quality of the iron produced by the cold blast and the hot blast?

A. Cold-blast iron is reputed to be stronger iron.

Q. Is there any difference in the market value of the hot-blast and cold-blast iron; and, if there is, please state what that difference is?

(Objected to by counsel for defendants.)

A. Cold-blast iron usually brings the higher price.

Q. The effect or result of cold blast being different in this respect from the effect of the hot blast, do you think the same cause can produce these different effects?

A. I am not certain that the effect is decidedly different.

Q. If a different quality of iron is produced in the cold-blast furnace from that produced in the hot-blast furnace, is not the effect or result of the operation of these different kinds of furnaces different?

A. Yes.

Q. Is not the material called furnace-runners longer retained in and exposed to the action of the products of combustion in the blast-furnace than they would in a foundry cupola?

A. Yes.

Q. Can you say with certainty whether this fact would or would not cause some difference in the product of such material when used in these different furnaces?

291 A. I can say with certainty that it would have no effect.

Q. You have said that you never used this material by itself in a blast-furnace, that is, without ore in the furnace at the same time. Have you ever used it in a foundry cupola in any way?

A. I never have.

Q. Referring to specimen "Exhibit H. H.," can you state whether or not, in your opinion, there would be any chemical change necessary to reduce the metal therein by an ordinary blast-furnace to the condition of pig-iron?

A. I don't think there would.

Q. Are you sufficiently familiar with the operation of the foundry cupola to say whether or not there is any change in the nature and quality of the iron which is put into said furnace as pig-iron and comes out in the shape of castings?

A. Slight mechanical changes.

Q. Do you say that there is no chemical change takes place in metal'ic iron when passed through a foundry cupola in this way?

A. The best authorities maintain there is none.

Q. Question repeated as to furnace-runners, or the material about which you have been testifying.

A. I think not.

Q. You state that you first learned of such use being made of this material in the fall of 1872 or winter of 1872–'73, and that Homer Hamilton and Co. were then engaged in that business. Have you any personal knowledge in the matter?

A. I have not.

292 Q. By what circumstances, if any, do you fix the time as you have done?

A. In the summer of 1873 we sold Hamilton some runners and it was some time previous I learned of it.

Q. Suppose you were informed that Homer Hamilton and Company were not or had not used any of this material during the summer or spring of 1873, but did use it in the fall of 1873. Is your impression or memory as to the matter so good that you could say positively whether the event referred to did not occur in the fall 1873, instead of the fall of 1872?

A. I should still think I heard it prior to the summer of 1873—some month' prior to that.

Q. Can you state who first told you of this matter?

A. I can't with certainty. I have no impression.

Q. After you commenced to use this material, which you before had thrown away, did you take any steps to recover what had been previously thrown away?

A. We dug over the cinder pile.

Q. Did you give any instructions to the parties you employed to collect this material from the dump with the view to prevent others from learning that you intended to remelt it for the iron that was in it?

A. No.

A. B. CORNELL.

293 CHARLES HIMROD, recalled by defendants, testifies as follows:

Q. State whether or not to the ordinary furnace-runner there is ordinarially more or less oxidized iron adhering.

A. There is always some oxide of iron with the cinder of the runner.

Q. How is it as to the pig and scrap iron of blast-furnaces?

A. There is no oxide of iron with pig or scrap unless they rust, or some is with cinder on them.

Q. State whether or not it would be practicable, in the ordinary use of furnace-runners and scrap in blast-furnaces, to remove the oxide of iron which adheres to them before placing them in the charge.

A. It would not.

Q. What necessity is there, if any, in your judgment, in the melting of furnace-runners, to mix or use with them any quantity of oxidized iron not adhering to them?

A. I don't think there is any necessity.

Q. In case furnace-runners are placed back in the furnace-stack and melted, as you stated in your former examination, and the iron in that way extracted from them, what amount of iron, if any, in metallic form would be left in the slag separated from the runners by that process?

A. Very little, if any.

Q. Suppose that these runners can be remelted, as above indicated, in blast-furnace stacks, state whether or not it would be necessary, in order to increase the production of iron from the same amount of iron ore, to melt the runners made by blast-furnaces in foundry cupolas?

294

A. It would not be necessary.

Q. In the ordinary use of these runners at blast-furnaces by putting them back in the stack and remelting them, state whether all the iron that can ultimately be extracted from the ore from which the runners were first made can be obtained.

A. It can.

Q. Suppose, then, that the runners made at each blast-furnace are used at the furnace to be again melted as above stated, in what way, if

at all, would the melting of the same material at foundry cupolas for the same purpose add to the quantity of metal'ic iron that could be extracted from the ores used at blast-furnaces?

A. I think the amount would be decreased by using the runners at the foundry cupolas.

Q. State your reasons for saying in your last answer that the amount of iron would be decreased.

A. There is always some waste in melting iron in a cupola, while there should be none in a blast-furnace.

Q. For the purpose, then, of melting these runners to be made into pig-iron, which, in your judgment, is best adapted to that purpose, an ordinary blast-furnace or foundry cupola?

A. My judgment would be that the blast-furnace would be the most useful.

295 Q. Suppose you had a blast-furnace in operation at which these runners were made, what would you say either as to the necessity or economy, for the purpose of melting the runners into pig-iron, of building a furnace especially adapted to the purpose of melting runners in connection with the blast-furnace first spoken of?

A. No necessity nor economy. I know of no furnace more especially adapted for that than a blast-furnace.

Q. What utility would you say, then, there would be in any process or method by which these runners could be melted into pig-iron by the use of the same appliances that are used at ordinary blast-furnaces, either by means of foundry cupolas or furnaces built especially for that purpose, for the purpose and with the object of obtaining from the ores all the iron therein contained that it is possible to extract?

A. There would be very little.

Cross-examination:

Q. In your experience and operation of a blast-furnace, how long does it ordinarily take from the time the charge is put in at the top until the material of which that charge is composed is converted into cinder and metal'ic iron?

A. It is owing to the size of the furnace. At the Himrod Furnaces the stock is about twenty-four hours in passing from the top to the tuyere.

Q. How long does it take to melt pig-iron or scrap-iron or the metal of furnace-runners, or other slag containing metal'ic iron, in a foundry cupola?

A. I don't know certainly.

296 Q. What is your best opinion on the subject?

A. I never saw them when they commenced to heat, but have received an impression, in some way, that it does not take one-half an hour.

Q. Supposing it possible to make pig metal, of as good quality as that made in an ordinary blast-furnace in twenty-four hours, by passing it through a foundry cupola in half an hour, do you think there would be any advantage or economy in the use of the cupola rather than the use of the blast-furnace?

A. I don't know how much fuel it requires in a cupola, and without that knowledge could not give an answer that would be of any value.

Q. Supposing the amount of fuel used to be the same in both cases, what then?

A. The blast-furnace would be the best furnace and would be the best place to use it. There would be no advantage in the cupola.

Q. If you can accomplish the same result in half an hour by the use of a cupola which you could by the use of a blast-furnace in 24 hours, would not, in your opinion, there be an advantage in the use of the cupola?

A. If you could accomplish all of the same results, there certainly would be.

Q. How much fuel do you ordinarially use in a blast-furnace in making up a charge, stating the proportions of the material and fuel?

297 A. We use at the Himrod Furnaces 200 pounds of coke and 375 pounds of coal, 400 to 425 or 450 pounds of ore, and from 90 to 225 pounds of limestone. The limestone depends on the kind of iron we wish to make and the kind of ore we are using.

Q. Do you make any change from this proportion of fuel when you use furnace-runners?

A. No.

Q. Do you make any change in the weight of furnace-runners when substituted for ore?

A. I put about as much runners as ore and lime combined.

Q. Then a charge made up with runners would, on an average, be of about equal weight with the fuel used with it?

A. Yes; with fuel in this proportion referred to, that is, the proportion of coal and coke.

Q. How much iron does such a charge ordinarially produce?

A. Runners vary materially in their yield. I should think, at a rough guess, that our runners average 70 per cent. metal'ic iron, which would make the yield for the charge about 420 pounds.

Q. Then, by this calculation, you produce about 420 pounds of iron from 575 pounds of fuel and 600 pounds of the runners. Now, suppose instead of using a blast-furnace you use a foundry cupola, and make up the charge 800 pounds of runners, 3 bushels of coke, or 120 pounds of coke, and a small quantity of limestone, and produce therefrom the same percentage of iron, to wit, 560 pounds of iron, would there, in your opinion, be any advantage or economy in using the cupola furnace

298 instead of the blast-furnace for the purpose of getting the iron out of the runners?

A. No. If you can melt the runners in a foundry cupola for nothing, without any expense whatever, the difference in the quality of iron I will make with that charge will pay the entire expense of using in a blast-furnace.

Q. Then, in your opinion, there is a material difference between the quality of the iron produced from runners in a blast-furnace and the iron produced in a cupola furnace from the same material, such a difference as will pay the whole cost of the fuel and labor of producing the iron in the cupola?

A. It depends on the kind of iron the blast-furnace is making; you can make the same kind of iron they would get in the cupola. My practice, as referred to, has been to make the runners into foundry iron. This would be better than they would make in a cupola.

Q. Suppose the iron of the runners be of the same quality, say in quantity a ton; divide that ton of runners into 2 equal portions, and put one portion through the blast-furnace and the other through the cupola furnace, with proper proportions of fuel for each as above stated, would the iron produced be the same or different in quality, in your opinion?

A. The iron made from runners in a cupola, I understand, is usually white or mottled; if the furnace you put these runners referred to

299 in, was making white or mottled iron, the iron made from the runners would be white or mottled, and probably the same as made from the runners in the cupola. If, however, the blast-furnace was making foundry iron, the iron from the runners would be made into foundry iron, and would be different from that made in a cupola.

Q. Suppose the furnace is working so as to produce white or mottled iron such as you say is produced by the cupola, would there not be a saving in fuel and time in the use of the cupola instead of the furnace for the purpose of getting iron out of the runners?

A. If the fuel is what you have supposed it to be there would be a saving of it. Of course the runners melt quicker in a cupola than in a blast-furnace, but pecuniarially speaking there would be no saving of time.

Q. Suppose A makes one barrel of flour from 5 bushels of wheat, with a bushel of mid'lings and a bushel of bran as the product of said 5 bushels of wheat; B takes that product, and he puts the bushel of mid'lings through another process which produces him half a bushel of flour and half a bushel of bran, as a result half a bushel more of flour than was produced by A; would, in your opinion, B have increased the quantity of flour made from the original 5 bushels of wheat?

(Objected to by counsel for defendants.)

A. As I understand the question, it includes the assertion that B has increased the amount of flour; if he has, he has.

300 Q. Suppose A makes one ton of pig-iron from two tons of ore, and other material necessary in the process, leaving a quantity of refuse material and the ton of iron as the result of the process; B takes the refuse material and puts it through a second process by which he obtains 200 pounds of iron in addition to the ton made by A; in your opinion, as the result of B's process has there been any increase in the production of iron from the original 2 tons of ore?

A. Yes; there is, of available iron.

Q. In the business you are now engaged in at the Himrod Iron Furnaces have you collected or recovered any quantity of material which in former times had been treated as waste material? If yea, how much?

(Objected to by counsel for defendants.)

A. There has been collected under my direction several hundred tons.

Q. Within what time has this been done?

(Objected to be counsel for defendants.)

A. About two years.

Re-examination:

Q. In the case supposed by solicitor for complainants, A makes a ton of iron from 2 tons of ore, and B takes the residuum and makes more iron from it; does it make any difference in the product of the quantity of iron from the ore whether B did it or A did it himself.

301 A. If A takes the residuum and makes the iron from it, of course it would make no difference.

Q. In the flour case supposed by the same counsel, suppose A had the facilities for using up the débris and make the additional quantity of flour supposed from it, by the appliances already possessed by him, what economy or profit would you say there would be in his building another mill for that purpose?

A. I should say there would be none.

Q. You have stated in your cross-examination that at the Himrod

Furnace, when using runner, you charge in the proportion of about 600 pounds of runners to 200 pounds of coke and 375 pounds of coal, making the charge of fuel 575 pounds. Suppose you were using all coke, what proportion of it would you use to the same quantity of runners?

A. 400 pounds.

Q. State whether, in your judgment, the same quantity of material, say runners, could be melted in a blast-furnace by the same amount of fuel, or with less than the same amount of runners could be melted in a foundry cupola, by the application of hot blast in the former case and cold blast in the latter.

(Objected to by counsel for complainants.)

A. I should think it would require less fuel in the blast-furnace than in the cupola furnace.

Q. State what is the ordinary object for using hot blast in hot-blast furnaces instead of cold blast.

(Objected to by counsel for complainants.)

A. To decrease the amount of fuel used.

302 Q. State whether or not at any point above the tuyeres in a blast-furnace it is hotter than any part of a foundry cupola in operation.

A. It is not, only within a short distance of the tuyere.

Q. State what would be your judgment as to the possibility of melting 800 pounds of runners to sufficient fluidity to cause the cinder and iron in the runner to separate and discharge from a foundry cupola with 120 pounds of coke.

A. I should think it was a pretty small amount, but my knowledge of the facts are not sufficient for me to give an opinion with certainty.

Q. What would be the ordinary weight of three bushels of ordinary coke?

A. All I know about it is that we buy 40 pounds of coke for a bushel; that is the custom here.

CHARLES HIMROD.

At this point adjourned till 9 a. m. to-morrow morning.

SATURDAY MORNING, *March 20th*, 1875.

Also JAMES CARTWRIGHT, a witness called on the part of the defendants, and by me duly sworn, as hereinafter certified, testified as follows:

Q. State your name, age, and place of residence.

A. James Cartwright; age, 48; reside in the city of Youngstown, Ohio.

303 Q. State how long you have been engaged in the business of manufacturing iron.

A. For the last 30 or 32 years.

Q. In what branch or branches of the business have you been engaged?

A. My business, until within the last 12 years, has been puddling or boiling iron. In the last 12 years I have been in the general rolling-mill business.

Q. State when you first knew, if ever, that furnace trough-runners contained metal'ic iron.

A. The first knowledge I had of it was in 1857, or about that time; not before that.

Q. How did you then ascertain it?

A. By working the said runners in a puddling-furnace.

Q. In what way did you work them in a puddling-furnace; that is, what kind of fuel did you use; what kind of blast, if any?

(Objected to by counsel for complainants.)

A. I worked them in the ordinary way of puddling iron, with stone-coal and natural draught of the ordinary puddling-furnace—no artificial blast.

Q. Did you use any fluxing material; and, if so, what?

A. We used nothing more than the ordinary mill cinder we use in puddling other iron.

Q. State what was the result of this process of working the runners.

A. The result was we took out a little below the average quantity of muck bar; what I meant to say was the yield was about 80 per cent.; regular iron would be about 90 to 96 per cent. yield.

Q. What difficulty, if any, did you find in the melting of these
304 trough-runners in the ordinary puddling-furnace, in the way you have indicated, and in separating the slag from the iron?

A. The runners would take some time longer to melt—considerable longer. The difficulty in taking the slag out was we had considerable more slag, and considerable more difficulty in taking it out, than the ordinary pig-iron.

Q. Please explain the operation of puddling iron in an ordinary puddling-furnace.

(Objected to by counsel for complainants.)

A. The process is simply melting the pig-iron with some common mill cinder, or slag, as we call it, and then the process still goes on until we commence working—it until foments. When the process of fomenting is over, the iron settles down into a body that we call sponge. That matter is worked a little more by the puddler and then formed into balls, taken out, and hammered and rolled or sque'zed and rolled.

Q. Before the puddling process proper, or stirring of the iron, has commenced is it completely melted or not?

A. No, sir.

Q. Is the iron at any time entirely melted?

A. Yes, sir; but we commence to operate on it before it is entirely melted.

Q. How is the blast or current of air which operates in the ordinary puddling-furnace produced?

A. We have in the first place what we call a grate; that is 3 by 4 feet. That is set up about 4 or 5 feet from the ground; the bars
305 which carry the fire are ¾ to 1 inch apart. At the other end of the furnace we have what we call the stack, 23 or 24 inches in diameter and from 35 to 40 feet high. That is the way we get the draft.

Q. State what knowledge you have, if any, as to the use of these furnace-runners in blast-furnaces or in foundry cupolas.

A. In answering the first part of the question, I am not a furnace-man and know nothing about their use in blast-furnaces; I have saw them used in a foundry cupola.

Q. In whose foundry cupola, and where?

A. I have saw them using them down at Mr. Homer Hamilton and Company's, probably within the last year.

Q. State whether you had any conversation with Homer Hamilton prior to October 1st, 1873, concerning the use of them in his foundry cupola.

(Objected to by counsel for complainants.)

A. I have no recollection of the dates when I had conversation with Homer Hamilton; don't recollect that I had any before that time.

Q. State for about how long after 1857 you continued to use runners in puddling-furnaces, if at all.

A. Well, frequently at intervals for 5 years succeeding that time.

Cross-examination:

Q. What do you mean by mill cinder; how is that cinder formed, and what is it composed of?

306 A. Part of it is taken from the puddling-furnace after the iron is taken out; part of it is squeezed or hammered out of the iron, and the balance is rolled out at the rolls and falls off in the shape of scales.

Q. What object do you have in view in using this material in a puddling-furnace in connection with the iron?

A. The object in doing that is to produce a quicker fermentation.

Q. Is this fermentation accompanied by an increase of heat?

A. The cause of this fermentation is caused by the introduction of oxygen; after we have it up to full fermentation we want all the heat we can get, and we introduce this material in order to hasten the process; the presence of the oxide hastens the process.

Q. (Witness shown specimen "Exhibit J. C., March 20th, 1875," and asked if that is the kind of runner material he refers to in his direct examination as having been used in a puddling-furnace.

Objected to by counsel for defendants.)

A. No, sir; this is not the principal stuff we used; we may have used some like this, but in larger pieces.

Q. Do you know whether or not this specimen is or has been formed in the runner of a blast-furnace, in the process of casting pig-iron therefrom?

(Objected to by counsel for defendants.)

307 A. I am satisfied that it has been formed by molten iron running through a runner, but whether from a foundry or blast furnace I cannot say.

Q. Is there in fact any artificial blast or mechanical means for forcing air used in the operation of a puddling-furnace?

A. We do use artificial means of forcing air through puddling-furnaces sometimes; we don't use them here on account of our coal being too light.

Q. Was there any artificial blast used in the puddling-furnaces to which you refer in your direct testimony and in which this runner iron was used?

A. There was no artificial blast used in that case.

Q. Why did you stop using the material you referred to?

A. That was in 1861; I severed my connection with Brown, Bonnell & Co. at that time. It may have been in 1862; I presume it was; I don't recollect exactly.

Q. Since that time have you been engaged in the business of *the* working iron in the puddling-furnace and rolling-mill?

A. That has been my business ever since.

Q. During this latter period have you used any of this runner iron in the puddling-furnace?

A. No, sir; we have not used any of this iron.

Re-examination:

Q. Where was it that you used the runners in 1857 and afterwards, as you have stated?

A. At Brown, Bonnell & Co.'s rolling mills, Youngstown, Ohio.

JAMES CARTWRIGHT.

308 Also JOSEPH H. BROWN, a witness called on the part of the defendants, being duly sworn by me, as hereinafter certified, testified as follows:

Q. State your name, age, and residence.

A. Joseph H. Brown; 65 next July; residence, Youngstown.

Q. State how long you have been engaged in the business of manufacturing iron, and in what branches or departments of it.

A. From a boy up; in the manufacture of merchant-iron nails in the early part of my life, and have had more or less to do with blast-furnaces since I was 20 or 21 years old; in the early part of my life, was engaged in charcoal furnaces.

Q. State when, if ever, you first knew or learned that furnace trough-runners contained metal'ic iron.

A. I can't tell you when I first knew it; as long as I have had anything to do with blast-furnaces, I think, I have known the trough-runners frequently to contain iron; what is left there in the trough is a mixture of iron and cinder and sometimes sand—the material of which the trough-runners is made.

Q. State what you know, if anything, as to the use of this material at the charcoal furnaces of which you speak for the purpose of being remelted in the furnace.

309 A. It has been customary, where the cinder has adhered to the surface of the iron only, for the cinder to be knocked off and save the iron by the parties who were economical in their business; but when it has been much mixed it has generally been thrown away with the cinder.

Q. State what you know, if anything, as to the use of this material at any of the charcoal furnaces for the purpose of being remelted, by putting it back into the stack with the other stock.

A. I think it all ought to be remelted in that way, by putting it through the blast-furnace with the other stock. I think that the most economical way of utilizing it. I can't remember about charcoal furnaces; it has been a number of years since I had much to do with them, but we have one now in Missouri where we utilize it as I have described.

Q. How long have you been operating the furnace in Missouri which you refer to?

A. I cannot remember the date, but think about some seven years.

Q. Have you utilized this material in the way above mentioned at that furnace since you commenced operating it?

A. Yes, to the best of my knowledge. That has been the orders to the superintendent. I usually go there once a year, but have not been there for two years. I have no doubt but those instructions are carried out.

Q. State whether that furnace is operated by cold or by hot blast.

A. Hot blast.

Q. State what you know, if anything, as to the use of these trough-runners in the ordinary blast-furnace of this section prior to October 1st, 1873, for the purpose of being used by being put back into the stack with the other stock.

310 A. I have always previous and now save those runners and put them back through the furnace with the other stock. We have dug up old cinder piles where they have been careless in not separating the runners from them, and run them through the furnace to some extent. We have bought some cinder runners from other furnaces, and run them through in the same way.

Q. Did you did up cinder piles, as stated, or purchase this material from others, prior to October 1st, 1873?

A. I can't remember. I have always known that there was considerable of that material in the cinder piles through this county, through the carelessness of furnace-owners, or for the want of the knowledge of the intrinsic value of it.

Q. For how long have you known of the use of this material as above stated, and for how many years have you so used it at your furnace?

A. I think about 23 years.

Q. State how many furnaces the firm of Brown, Bonnell and Co., of which you are a member, have operated, and for how long.

A. We have operated three furnaces in the last 18 years; not all of them at one time. We have operated the two here about 13 years.

Q. During the time you have operated the furnaces in this city, state whether or not you have utilized trough-runners made at them in the way you have mentioned.

A. I have repeatedly cautioned the superintendent of the furnace to be careful and save all those runners, as it required caution and watchfulness; being mixed with the other cinder, it was liable to be
311 carried off by the carter to the cinder pile, and we have always used them.

Q. State what you know, if anything, as to the building of a small furnace at New Castle, Lawrence County, Pennsylvania, at any time, for the purpose of melting these runners.

A. I do not remember having heard of that, of any furnace being built there for that purpose.

Q. State how long you have known, if at all, of furnaces being operated by the application of cold blast.

A. I think about fifty years, to my knowledge.

Q. State then what there was new, if anything, prior to October 1st, 1873, in the operation of melting metal'ic iron by the application of cold blast, say such as scrap-iron, pig-iron, mixed with cinder and trough-runners.

A. Nothing that would be new to me, that I know of.

Q. State what there was new, if anything, prior to the same time, in the use of coke or charcoal as fuel in blast-furnaces.

A. The application of hot blast to blast-furnaces commenced about 1837; was a great improvement in the saving of fuel and production of iron in larger quantities at the same time.

Q. State what was the fuel ordinarily used in blast-furnaces prior to the introduction of the hot blast.

A. Charcoal and coke.

Q. What was ordinarily used then and since for fluxing material?

A. Limestone.

312 Q. State what knowledge you have, if any, as to the use of these furnace-runners in foundry cupolas, for the purpose of making pig-iron or castings, before October 1st, 1873?

A. I can't tell whether I ever heard of their being used prior to that date; heard of their being used, but cannot say if prior to that time.

Q. State whether or not you heard of their use in that way at Beaver Falls, Pa.

A. I do not recollect having heard of it.

Cross-examination:

Q. Please give the name and location of the furnace which you operated besides those you have here.

A. Briar Hill.

Q. When did you operate it?

A. About 17 or 18 years ago.

Q. How long did you run that?

A. Some six years, I think.

Q. State if you are familiar with the practical operation of a blast-furnace.

A. Yes, sir.

Q. Suppose an ordinary blast-furnace to be empty, or to have been blown out, how would you proceed to charge the furnace and set it to going again?

A. Our way of blowing in a new furnace is to put in wood and kindling at the bottom, so as to be able to ignite the fire, and then coke until you fill the furnace probably one-third coke, with a little lime
313 mixed with it, and as you get the furnace half full you may commence putting on ore in light charges.

Q. After the furnace is started what is the usual charge, stating materials and quantities of materials?

A. That depends on the quality of ore you use and the limestone, coke, &c. We use here in our furnaces about one and a half gross tons of Lake Superior ore, about 75 bushels of coke, and from ten to fifteen hundred pounds of limestone for one gross ton of pig-metal. The charges are equal quantities in about that proportion.

Q. How long does it take to make a charge through the furnace?

(Last two questions objected to as not being cross-examination of any matters on which this witness was examined in chief.)

A. I can't answer that question. It depends on the kind and size of the furnace. With our furnaces it takes about 30 hours, as near as I can tell.

Q. Are you familiar with the appearance of the material about which you have been testifying under the name of trough-runners?

A. Yes, sir.

Q. Please look at the specimens before you and say which, if any of them, are specimens of this material.

(Objected to on the ground above stated.)

A. (Witness examines specimens and states:) Specimens marked Exhibit J. C. is either from the trough of a blast-furnace or from the
314 trough of a cupola. Exhibit H. H. 2 may have been out of a trough-runner, or may be material that may have run over the side of the trough, mechanically mixed with cinder. Exhibit H. H. is similar to the last; Exhibit H. H. 4 similar to the other.

Q. You state in your direct examination that you think the most economical way of using this material is by putting it through the blast-furnace. When using it as stated do you use it mixed with ore or by itself?

A. We have used it mixed with ore.

Q. Does it take about the same time to come through the furnace as ore?

A. When mixed with ore it does.

Q. Are you familiar with the construction and operation of the foundry cupola?

A. Not so familiar as a foundryman ought to be, but know considerable about them; but they are not in my branch of business.

Q. Do you know about how long it takes to melt pig-iron in a foundry cupola?

A. Not enough to answer that question definitely.

Q. Suppose that a quantity of this material called trough-runners was melted in a foundry cupola, the charge being, say, 1,000 lbs. of the material, five bushels of coke, and a small quantity of limestone, and that the operation was completed in half an hour or so, and the result was about fifty per cent. of pig-iron, that is, about 500 pounds for every charge of the material, would that, in your opinion, be any saving
315 in fuel or time, or in both fuel and time, than if the same amount of material were charged in a blast-furnace, with about 25 bushels of coke and 800 pounds of limestone, 24 to 30 hours being required in the process and the same quantity of pig-metal being produced?

(Objected to by counsel for defendants.)

A. I don't think it takes any additional coke or lime in a blast-furnace the way we work it. If the supposition is correct, and it requires the quantity of fuel stated in a blast-furnace, then it would be more economical to use it in the foundry.

Q. If time be any object, do you think that there would be any advantage to use the cupola instead of the blast-furnace for getting the material out of these furnace-runners, the process taking about 30 hours in the one case and about half an hour in the other?

A. If time was the main object, of course the cupola would be the best and shortest.

Q. You say in your direct testimony that you have dug over old cinder piles for the purpose of obtaining this material to resmelt in a blast-furnace. Whose cinder piles do you refer to?

A. Some piles of cinder that accumulated at the furnaces before we got them, and from some piles at our furnaces after we got them, and some from other furnaces we have bought.

Q. Then you have collected this material at your furnaces, or cinder dumps, which had previously been thrown away by your work-
316 men; is that correct?

A. Yes; by their carelessness in not separating it as it should be when taking out cinder.

Q. When and where did you get the cinder which you purchased from others?

A. I cannot tell every place we bought from, but got the largest amount from the Wheatland Furnaces, sometime in 1874.

Q. When did you dig over your own cinder pile for this purpose?

A. I think it was in 1874.

Q. How is the refuse material at your furnace disposed of?

A. It is taken out with carts principally.

Q. Have you ever seen the runners used in a cupola furnace?

A. I have never seen them used as runners, especially in a cupola furnace, but have seen them in piles of iron at cupola furnaces.

Re-examination:

Q. State whether or not these runners can be used at blast-furnaces to be remelted and made into pig-iron by filling them into the burden of the stack, while ores are being smelted therein, without the addition of any fuel more than is required to smelt the ores.

A. I have no doubt they could be, to the extent of five per cent. of the iron made.

Q. State about what proportion of the iron ordinarily made at blast-furnaces would be ordinarily produced from the runners
317 made at such furnace in case they were used by putting them

back into the stack as fast as made; that is, about what percentage.

A. Furnaces vary very much in producing those runners; probably would not be more than a quarter of one per cent. with careful working, and furnace working well. This is simply a supposition, as I have never weighed them. This would be one-fourth of a ton of runners to one hundred tons of iron.

Q. State whether or not, in your judgement, all the runners ordinarily made by an ordinary blast-furnace, while operating ordinarially well, could be melted in the stack of the furnace and made into pig-iron, while said furnace is running on the ordinary ores used in this section, without the use of any additional fuel, so far as the runners themselves are concerned.

A. I think they could.

Q. If, then, this material could be so utilized at blast-furnaces where made *made*, without any expense for fuel to melt them, what would you say as to the utility of any process to melt them for the same purpose in a foundry cupola where fuel would be required and fluxing material, together with a blast for that purpose, for the purpose of making them into pig-iron?

A. I should think it would be an additional expense that could be avoided, as I said before. In working it in a cupola they must get quite a quantity together before commencing to work it, which would
318 be from various costs of iron, which would be very apt to vary in quality, and not be near as good iron as though put through the blast-furnace, as a cupola has little or no power for carbonizing or changing the metal. In a cupola, if the runners should be of pure white iron, the iron produced would be white, whilst going through a blast-furnace, and being mixed with the ores, would have the effect of improving the quality of metal in the runners.

Q. What would you say as to the utility, economy, or profit of building near to or in connection with a blast-furnace already in operation another furnace specially adapted to the melting of these runners, and for that purpose alone, in order to make pig-iron?

A. It would be a useless spendage for using the runners that the blast-furnace would make.

Recross-examination:

(Objected to by counsel for defendant.)

Q. Have you made any practical test as to the amount of fuel required to melt furnace-runners?

A. Nothing more than in a blast-furnace. I have never melted them in a cupola.

Q. Have you in a blast furnace?

A. Yes, sir.

Q. Is the practical experience you refer to that which you have before referred to, namely, that while using one-fourth of one per cent. of the runners in the blast-furnace you have not required any
319 additional fuel?

A. Yes, sir.

Q. In your opinion, is the result accomplished by a blast-furnace chemically different from the results accomplished by the use of the cupola upon this material?

A. A cupola and a blast-furnace are somewhat similar; but the cupola is so small, and the material passing through it so rapidly, there is not sufficient time given to the material for the chemical decomposition

of the impurities. For instance, put ore into a cupola; it would not be composed, but would be melted into a mass of cinder or ore, and run out in that state, and to the same extent it would have the same operation upon metal or runners. But in a blast-furnace it would have the effect to decompose the ore and purify the runners or metal, making a different result.

Q. Suppose a large quantity of this runner material to be charged in the blast-furnace, say ¼ of the burden of the stack, in your opinion would the metal in the runners, supposing it to be different from the metal of the ore, would the pig-iron be changed by the presence of such quantity of this different metal?

A. They would effect the metal.

Re-re-examination:

Q. Suppose that the percentage, as stated by you above, of one-fourth of one per cent. of runner material was used in connection with
320 the ores while the furnace was making good iron, would the runner material in such quantity materially change the quality of the iron being made?

A. It would not materially, but, if anything, it would improve the quality of the iron, because the runners have already undergone a chemical decomposition and are already iron mixed with cinder, and going through the furnace a second time it has a double chance of becoming purified, and theoretically, and, I think, practically, would be of better quality.

Q. State whether or not at blast-furnaces where these runners are remelted as made at the furnace, there is an opportunity to select runners containing the quality of iron as that which it is desired to make while using them.

A. It does not make any material difference whether selected or not.

Q. What proportion of runners to the ores being used can, in your judgment, be safely used so as not to change the quality of iron being made at the furnace?

A. I should think we could use as much as a half of one per cent., or a half a pound of runners to 150 pounds of ore, that is, to ore of 65 per cent.

J. H. BROWN.

321 CHRISTOPHER T. MEADSKER, a witness called on behalf of the defendants, and by me duly sworn, as hereinafter certified, testified as follows:

Q. State your name, age, and place of residence.

A. Christopher T. Meadsker; age, 37; residence, Youngstown.

Q. State what is your present occupation, and how long you have been engaged at it.

A. Am foreman for Homer Hamilton and Company in a foundry; have been in that position eight years.

Q. How long have you been engaged in any capacity in and about foundries?

A. In the neighborhood of 16 years.

Q. State whether you were present in March, 1873, at a time when Homer, Hamilton & Co., at their foundry, melted a quantity of furnace-runners into pig-iron.

A. Yes, sir.

Q. State who superintended the charging of the cupola at that time, and whether you knew exactly how it was done.

A. I superintended myself and put the most of the material in myself; I know how it was done.

Q. State how.

A. We fixed up the cupola the same as we would for melting iron; put on a bed of coke about two feet above the tuyeres; we then put on about 30 hundred of runners, a small amount of limestone, and
322 covered the whole of it with coke; then we added ten hundred more of runners and another small quantity of limestone; then we put the blast on.

Q. What, if anything, did you do different from the ordinary way of melting pig-iron in a cupola?

A. All the difference was in adding the limestone.

Q. State whether or not, previous to that time, you had ever used limestone in any quantity when melting pig-iron in the cupola.

A. I have.

Q. For what purpose?

A. For fluxing the iron.

Q. What did you use it with the runners for?

A. Fluxing, and making the cinder run more freely.

Q. In melting runners at that cupola since that time, what difference have you made, if any, in the materials used in the cupola with the runners?

A. Used the same materials, only added more limestone.

Q. State whether or not, in the use of runners at that cupola, before putting them into the cupola you have ever made them granular or spongy by passing water or air through them while in a melted state, or in any other way except by breaking them up.

A. No, sir.

Q. State whether you have ever put into the cupola with them any scrap-iron when making pig-iron from them.

A. No, sir.

Q. State whether you have used with them any oxidized iron,
323 excepting that which adhered to the runners themselves.

A. No, sir.

Q. State whether you used in connection with them any scale, or black oxide of iron, by sprinkling it into the cupola or otherwise.

A. No, sir.

Q. State whether or not you have used while melting them any black oxide of manganese, or salt, or litforge, or a mixture of any of these, by blowing it through the tuyeres or otherwise.

A. No, sir.

Q. State what else, then, you have used, if anything, when making pig-iron from these runners, except the coke, limestone, and runners.

A. Nothing else.

Q. State whether or not you used coke and limestone any differently from what you did when melting pig-iron, excepting you used more limestone when melting runners.

A. Did not use it any differently; probably used more coke.

Q. State whether or not others were present and saw it operated when these runners were melted in March, 1873.

A. Yes, sir; there were.

Q. State the names of those you remember.

A. Owen Mulhamen, Frederick Kriechbaum, George Brilstein, Richard McAndrew, Homer Hamilton, Frederick Gerwig, and myself.

Q. State, as nearly as you can, what amount in weight or bushels

of coke is required to make one ton of pig-iron from ordinary
324 furnace *furnace* runners in a cupola.

A. It will take in the neighborhood of 100 pounds of coke to melt 300 pounds of runners, take the runners as they come.

Q. In working a cupola continuously, in order to make pig-iron from furnace-runners, how long will it stand the operation?

A. About two days would play it out to run right straight along.

Q. In what condition would the cupola then be?

A. The lining would be burnt out to the shell from three to four feet above the tuyeres.

Q. What would it then be necessary to do before commencing the same operation?

A. Lime it up anew.

Q. Then suppose you commence again to melt runners for pig-iron, and continue the operation in the daytime only—say, 10 hours a day—how would the cupola stand it?

A. It would stand about five days by repairing every day.

Q. Explain in what way it would be necessary to repair.

A. Patching up the burnt places in the lining with fire-clay and sharpe sand.

Q. State whether or not, during your experience at foundries prior to March, 1873, you have melted pieces of runners among the pig-iron used, and pigs of iron or pieces of pigs to which there was slag adhering that could not be removed before being placed in the cupola.

325 A. That is something I don't know as I ever paid any attention to.

Q. Have you paid any attention to the quality of pig-iron made at the cupola of defendant's from these runners?

A. Yes, sir.

Q. What change, if any, is there made in the quality of the iron contained in the runners by melting it in the cupola?

A. It would produce it more harder.

Q. How would it be as to improving its quality or otherwise?

A. In all the experience I have had in melting this iron I picked the runners with grey cinder, or those which it was supposed were made when the furnace was making grey iron; putting them in the cupola they would make pig-iron of a white mottle.

Q. Is the white or mottled iron as valuable as the grey iron?

A. Not for foundry purposes.

Q. State whether or not you have had the charge of the operations and working of the cupola of Homer Hamilton & Co. since they commenced to melt these runners.

A. Yes, sir.

Cross-examination:

Q. When did you commence to work this cinder at Homer Hamilton's foundry?

A. 25th day of March, 1873.

Q. Now do you know that it was that date?

326 A. On the 24th day of March, 1873, I helped t*are* up a railroad, and watched there all night; next day being a broken day we melted runners. That is the way I find out it was the 25th day of March.

Q. How do you know it was the 24th of March that you tore up the railroad track?

A. By my time-book. The men employed and myself got double time for that job.

Q. Where were the other men belonging to the works at the time you melted the runners on this occasion?

A. They was off that day, owing to being up the night before.

Q. Then there was no one present except those you have named?

A. That is all that was employed that day.

Q. Did you tell any one about it the next day?

A. I don't recollect; have no doubt I talked about it.

Q. Can you name any one to whom you did talk about it?

A. No; I cannot.

Q. Where was the experiment made?

A. In Homer Hamilton & Co.'s new foundry.

Q. Was that foundry in full running order then?

A. Yes, sir.

Q. How long had the cupola been in operation?

A. I think it was the first day of February that we commenced in the new place.

Q. How long before that had you last worked the cupola at the old place?

327 A. If I recollect right it was eight days; we were 8 days moving over.

Q. Did you ever use the old cupola for this purpose?

A. No, sir.

Q. Did you have any of these runners in the yard of the old foundry?

A. No, sir; not to my recollection.

Q. Did you ever haul any runners from the old yard to the new for the purpose of making this experiment in March, 1873?

A. No, sir; I never did.

Q. Was there any so hauled for that purpose?

A. No, sir; not to my knowledge.

Q. Would you be likely to know if they were so hauled?

A. I think I would.

Q. Where did you get the runners that were used on that occasion?

A. When we were filling up around the new foundry the company hired the carters to haul cinder from Himrod's Furnace; we picked runners out from among the cinder; that was the first runners we ever got, to my knowledge.

Q. How much did you get in that way?

A. From five to ten tons.

Q. When was this?

A. In February.

Q. Did you ever tell any one that you had made iron from this material in the cupola at the old furnace?

A. No, sir.

328 Q. How much did you have on hand of this material at the time you made the experiment?

A. I should judge somewhere in the neighborhood of 50 or 70 tons.

Q. How much did you have on hand when you commenced to work it in the fall of 1873?

A. Some place in the neighborhood of 400 tons.

Q. Did you ever see Mr. Charles Himrod at the cupola when you were making this material into pig-iron?

A. I recollect seeing Mr. Charles Himrod and Mr. O'Donnell in the foundry one day when we were melting runners.

Q. When was that?

A. In the fall; I can't tell the exact date; shortly after we commenced making pig-iron.

Q. When did you commence making pig-iron in the fall?
A. I think in the early part of September.
Q. How much iron did you make in September, 1873?
A. Some place in the neighborhood of a hundred tons; I can't remember.
Q. Are you sure of that?
A. I am no surer than I stated before. We made somewhere near that. The first lot of iron we made we did not weigh it until it was sold.
Q. Did all the workmen in the foundry know that you were making this iron at the time you state?
A. Yes, sir.
Q. Who directed you to make this iron?
329 A. The company.
Q. Did Mr. Hamilton direct you?
A. Yes, sir. He was the principal business man in the company in the mechanical part.
Q. Do you on your oath say that you made a large quantity of iron in the month of September, 1873, at the new foundry of Homer Hamilton and Company at the foot of Market street in Youngstown, Ohio, from furnace-runners?
A. As I stated before, we made somewhere in the neighborhood of 100 tons; cannot state the exact amount.
Q. Was that in the month of September?
A. Yes, sir.
Q. Suppose that your employer had on his oath stated that he did not make any iron except upon the last day of September, 1873, what would you have to say to that?
(This question and the last 9 preceeding it objected to as not being cross-examination and wholly immaterial by counsel for defendants.)
A. All that I can say is from recollection. I have kept no books, and have given my best recollection.
Q. Might it not then have been in the month of October, instead of September, when you made this iron?
(Objected to by counsel for defendants for above reasons.)
A. As I have stated before, it was in September. I think it was in September.
Q. Where did you get the runners you say were on hand in the month of February, 1873, besides those which you got out of his yard?
330 A. Besides those we picked up out of the cinder, which was hauled to fill up the yard? The company teams hauled some, and a man by the name of Degan, as near as I can recollect.
Q. How were they disposed of in the yard?
A. Piled up in a pile.
Q. In which part of the yard?
A. I should judge at the southeast corner; they laid between the foundry and the railroad.
Q. Were they so every one could see them?
A. Yes, sir.

At this point adjourned till 9 a. m., Monday morning.

MONDAY MORNING, *March 22d*, 1875.

Q. Are you familiar with the construction of the ordinary foundry cupola and its use for the purpose of melting iron to make castings?
A. Yes, sir.

Q. Does it usually have any hole for tapping cinder when melting pig-iron?

A. Not for ordinary cupolas.

Q. Did you ever know of a cupola-furnace having such a hole prior to the time you commenced working this material called furnace-runners?

A. I have heard of them, but never saw them.

Q. Do you know Mr. Stambaugh, of the firm of Homer Hamilton & Co.?

A. Mr. John Stambaugh? Yes, sir.

Q. Was he present at the time you say that you first melted this material in March, 1873?

A. I don't think he was. I don't recollect, though.

331 Q. Do you remember having seen him about the works shortly before that time?

A. I saw him the day before.

Q. How do you usually charge the cupola with this material after it is in operation?

A. Ten hundred of runners; about 100 pounds of coke to each 300 of runners.

Q. How many bushels of coke do you put on with the ten hundred of runners?

A. We don't go by the bushels. To the ten hundred of runners and the amount of coke that I stated put on about 100 pounds of limestone.

Q. In your direct examination you say it takes 100 pounds of coke to melt 300 pounds of runners; a bushel of coke weighing 40 pounds, that would be 8⅓ bushels to the charge of ten hundred of runners; is that what you mean to say?

A. I can't say that we use that to every ten hundred; that includes the bed, and is the average of the day's run. We only use three or four bushels to the charge.

Q. In your operations with this material, is the furnace you use an ordinary cupola furnace?

A. It is a common cupola.

X. Q. Do you break up the slag into pieces before putting it into the cupola?

A. Not as a general thing.

Q. Do you ever break them up?

A. I did one day; the result was I could not make so much iron.

Q. How do you account for this fact?

332 A. It laid too close in the furnace; the blast wasn't sufficiently strong to work through.

Q. In your opinion do they melt faster or slower by being broken up?

A. They melt slower with me.

Q. In how large masses do you put them into the cupola?

A. We put them in in such sizes as they come from the furnace; some pieces are as large as a man can conveniently lift up and put into the charging-door.

Q. Do you ever find them larger than a man can lift?

A. Yes, sir; I have found some.

Q. When you are running the furnace upon pig-iron, do you put in the pigs whole, or do you break them up?

A. Break them into two pieces.

Q. In your opinion does the pig-iron melt faster put in whole?

A. No, sir; because it will naturally lodge being so long; we term it hanging.

Q. Which is the larger of the two, the pig-iron or the runner material?

A. The pig-iron is three feet six inches long and the runners are about 18 to 20 inches long.

Q. How do they compare as to diameter or width across?

A. The runners are generally wider in diameter than pigs and not so long.

Q. Have you ever seen the operation of casting pig-metal in a blast-furnace?

A. Have saw the cast.

333 Q. How does the trough and sand-runner compare with the size of the pig-beds, both as to width, depth, and length?

A. The trough is larger and the sand-runner is larger. The trough-runner is on an incline from the furnace. That would naturally make the runners not so large as the shape of the trough is. The runners are broken up by the furnacemen so they can handle them.

Q. In your experience as a foundryman, which would be the most apt to come down below the tuyeres in a cupola furnace in an unmelted condition, very large or very small pieces of metal?

A. A large, solid piece of iron would be very apt to go below the tuyeres before melting.

Q. Before proceeding to work this slag in a cupola, do you first put in a bed of coke?

A. Yes, sir.

Q. Do you next put in the runners?

A. Put in runners and limestone.

Q. Do you put in the runners as you find them, or as they come from the furnace cinder-dump?

A. Put in the runners just as they happen to lay in the pile.

Q. Do you have a cinder-hole besides the ordinary tapping-hole in the cupola?

A. Yes, sir, when melting runners.

Q. You have stated in your direct examination that the iron is rendered harder by passing these runners th'ough the cupola. In your opinion would the addition of soft scrap-iron improve the quality?

A. I think a considerable amount would.

334 Q. What amount do you use when you make castings from this material; what amount of scrap do you use?

A. We never used any scrap with the runners.

Q. Did you ever make any castings from the runners?

A. Not particularly from runners.

Q. What do you mean "Not particularly from runners?"

A. Runners exclusively, alone; have made castings from runners and pig-iron.

Q. Do you mean to say that you have never used scrap-iron in connection with furnace-runners for the purpose of making castings or pig-metal?

A. No, sir, I never did use any.

Q. You have stated in your direct examination that you have had charge of the operation and working of a cupola of Homer Hamilton and Co. since they commenced to work these runners. If any scrap-iron had been used in connection with them, would you know the fact?

A. I never was ordered by the company to use any scrap-iron, or

never ordered any of the men to use any. I think I would have known if any was used.

Q. Please look at Exhibit J. C., March 20th, 1875, and say whether or not you ever used any material like that in connection with runners in a cupola furnace?

A. Not to my recollection; I never picked out anything like that to use.

Redirect examination:

335 Q. You say in your cross-examination in melting runners for the purpose of making pig-iron you first placed in the cupola a bed of coke. State whether or not you did the same thing in the same way when you melted pig-iron in order to make castings.

A. I did the same way.

Q. State how and at what place in the cupola you made the hole in order to let off the cinder

A. We made a hole in the side of the cupola about three inches below the tuyeres by cutting a hole through the shell and then making a hole through the lining inside of the cupola.

Q. You say you have seen them cast at blast-furnaces. State whether or not you cast from the cupola in the same way when you make pig-iron at the cupola as they cast at the blast-furnace.

A. No, sir; we tap into a ladle; when the ladle is full, hoist it up with a crane, swing it around to the pig-beds, and pour it into pigs.

Q. State in what that method differs, if any, from the ordinary way of using the liquid metal in order to make castings.

A. There is nothing different.

Q. State whether the iron made from runners is let out of the cupola in the same way as when making castings from pig-iron.

A. It is, sir.

CHRISTOPHER T. MEADSKER.

336 THOMAS W. KENNEDY, recalled, testified as follows:

Q. Please state as nearly as you can about what proportion of the iron made at an ordinary blast-furnace goes into and composes a part of the trough-runners of such furnace.

A. From one-half of one per cent. to one per cent.

Q. State what difficulty, if any, there would be in the operation of such furnace to remelt these runners in the furnace, in the proportion and quantity above stated, while smelting ores in the furnace, without the addition or consumption of any more fuel and limestone than would be necessary to smelt the ores being used.

(Objected to by counsel for complainants as being immaterial.)

A. There would be no difficulty if used properly, or at the time the furnace would need either runners or scrap to increase its running.

Q. What would you say as to the utility of constructing a furnace specially adapted to the melting of these runners, in order to make pig-iron from them, near to or in connection with an ordinary blast-furnace or furnace where the runners are made?

A. I think there would be no necessity nor nothing to be gained in building a furnace in addition to the blast-furnace or furnace refer'ed to in the question.

Q. State whether you have the means of knowing what effect is produced on pig-iron and ordinary furnace-scrap by being melted in
337 a foundry cupola as to *as to* improving or otherwise the quality of iron.

A. I have had.

Q. Please state how that operation affects the quality of iron.

A. It makes it closer in the grain and increases its strength, if the pig-iron from which it is made is open grey, but if the pig-iron is very close and hard, it may deteriorate in strength, by being melted in a cupola.

Q. What comparison as to commercial value does pig-iron made from a cupola bear to pig-iron made in a blast-furnace generally?

A. My opinion is, from what I know of being sold the iron made from a cupola would be worth ¾ as much as that made from a furnace.

Q. State whether or not, in your judgment, that difference in value would pay for the coke or fuel necessary to melt the runners from which the pig-iron was made, assuming it required 120 pounds of coke to melt 800 pounds of runners.

A. Yes, it would buy that much coke and a great deal more.

Cross-examination:

Q. How long is it since cupola iron has been known in the market, if it has ever been known?

A. First knew of its being sold 12 or 16 months ago.

Q. To whom do you know of its having been so sold?

A. To Byres of Pittsburgh.

Q. What was the price of it, do you know?

A. I don't know as I can tell exactly; from $21 to $23. I think
338 we were selling to the same parties at the same time furnace iron for about $27.00.

T. W. KENNEDY.

OWEN MULLHANNON, a witness called on the part of the defendants, and by me duly sworn as hereinafter certified, testified as follows:

Question (by counsel for defendant). State your name, age, and place of residence.

A. Owen Mulhannon; age, 25 years; reside in Youngstown.

Q. State whether you are now employed by defendants Homer Hamilton & Co., and how long you have been in their employ.

A. I am; will have been three years in their employ the 2nd of next May.

Q. State what work you have been doing for the defendants during that time.

A. Attending cupola.

Q. State who is the superintendant and has been during that time of the running of the cupola?

A. Charles Meadsker.

Q. State if you were present and assisted in making pig-iron in their cupola in March, 1873?

A. Yes, I was.

Q. Who put the runners and other material into the cupola at that time?

A. Charles Meadsker and I.

Q. What did you put in?

339 A. I put in coke, runners, and limestone.

A. State what else you put in, if anything, or saw put in.

A. Nothing else put in.

Q. State what difference there was, if any, in the way in which you melted those runners at that time and the way you melted pig-iron before that time, excepting that you used more coke and more limestone.

(Objected to by counsel for complainant as leading.)

A. That is all the difference.

Q. Tell us how before that time you charged the cupola, when you melted pig-iron for castings.

A. Put in a bed of coke first, about 16 or 18 inches above the tuyeres, and then put 50 hundred of iron above that, and then about 200 of coke or a little over, and put 20 hundred of iron on it.

Q. State whether or not you have been present assisting in the work of operating the cupola since March, 1873, when they made pig-iron there from runners.

A. Yes.

Q. State how you charged the cupola when making pig-iron from the runners since that first time in March, 1873.

A. Put in bed of coke first about 20 inches, or 2 feet, and then put on 30 hundred of runners with some limestone, then covered the runners over with coke, and then put on 10 hundred of runners, and so on.

Q. State whether or not you used any scrap-iron or rusted iron, or burnt iron with the runners?

340 A. No.

Q. Sometimes in casting, when you are using pig-iron, state whether or not there is a quantity of iron left in the cupola above what is necessary to make the castings.

(Objected to by counsel for complainants.)

Q. State what is done, if anything, with any iron that is left after forming all the castings.

A. Get a hoe and make 3 or 4 strokes in the form of pigs in the dry sand, and pour the iron into them, and let it stay there till the next day.

Q. State whether or not this was done at that foundry before March, 1873.

A. Yes, it was always done with iron we had left.

Cross-examination:

Q. When was it that you say that you first saw runners made into iron in a cupola furnace?

A. I can't exactly tell the date, but think it was in March, 1873.

Q. How long did it take to make the casting at that time?

A. We put on the blast, as near as I can tell, about 3 or 4 o'clock, and took it down in about three-quarters of an hour.

X. Q. What were you doing in the forepart of the day?

A. We all came to work in the morning at the shop, and there was word sent on after us to go on down to Pittsburgh depot; we were all there until 11 o'clock, and I was sent for to go down to the shop
341 and get ready the cupola. I worked as hard as I could, but I could get her ready no sooner, to put on the blast. When I got her ready the boss and I charged her.

Q. Where is the Pittsburgh depot?

A. Down in the lower part of town.

Q. What were you all doing down there?

A. Watching an old railroad that was torn up; sitting on the ties.

X Q. How long had you been there watching the railroad?

A. I had been there from about 8 in the morning till 11.

Q. Who sent for you to come to the shop?

A. The clerk, named Fred.

Q. Is he the same clerk that is there now?

A. The same one.

Q. When you talk of the boss, whom do you mean?
A. Chris. Meadsker.
Q. When did you next make iron there in this way?
A. The winter after that—I can't keep track.
Q. Was you in the employ of Homer Hamilton & Co. before they moved to their new shop?
A. Yes.
Q. When did they move?
A. They moved that winter; I think it was 2 years ago this winter.
Q. How long after they got into their new shop was it before they commenced to make castings?
A. Before they had got all removed from the old shop they made castings in the new one. The cranes were the last things moved; but there was a new crane in the shop ready for use when we moved.
342 Q. Which crane was used in the casting this heat of runner metal?
A. The big crane, I think—the 3 cranes were put in the shop at the time the casting was made, but am not sure.
Q. Do you know Mr. Charles Himrod?
A. I don't know him, but I have heard his name.
Q. Do you know him when you see him?
A. No.
Q. Do you know Mr. John Stambaugh?
A. Yes.
Q. Was he there at that time?
A. No. Not that I saw.
Q. Do you remember if you saw much of him at that time, or previous to that time?
A. No. I never saw him very much in that shop; never seen him there more than three or four times since the shop was put up.
X Q. Where did you get the slag or runners you used at this time?
A. Got them outside of the shop; Degan hauled them.
Q. Did he haul any from the old foundry?
A. No. I never saw any there.
Q. Was Degan hauling cinders to fill up the yard at that time?
A. I don't know.
Q. Did you dig any of these runners out of the yard?
A. No, not that I saw.
Q. How big a pile was there at this time?
A. I can't exactly say; there was a big pile; I can't say how many tons.
343 Q. Would there be from 100 to 150 tons?
A. I don't know.
Q. Where were they piled up?
A. At the corner of the shop, between that and the railroad.
Q. Did you tell any one about what was done that day?
A. No, I don't think I did, unless it was those fellows around there who saw it as well as me.
Q. Who do you mean by those fellows?
A. Chris. Meadsker, and Fred. Kriechbaum, George Brilstire, and Homer and Gerwig, and Richard McAndrew.
Q. Were they all that was present?
A. All that I remember; unless some one came in the back door and went out that I did not see.
Q. Was there any talk amongst you about this thing?
A. No, nothing that I heard of.

Q. Had you ever done anything like this before?
A. No.
Q. Did it strike you as anything strange or new?
(Objected to by counsel for defendants, as not being cross-examination.)
A. No, not a bit.
Q. What day of the week was it?
(Objected to by counsel for defendants, reason same as before.)
A. I don't know.
Q. What day of the month was it?
A. I don't know exactly, but somewhere about the 20th of March.
Q. What kind of weather was it that day?
344 (Objected to by counsel for defendants, same reason as above.)
A. I think it was a fine sunshiney day.
Q. Was there any snow on the ground?
(Objected to by counsel for defendants, reason same as above.)
A. I don't know.
Q. What sort of day was the day before that?
(Objected to by counsel for defendants.)
A. I don't know.
Q. How did you get rid of the cinder?
(Objected to by counsel for defendants, reason same as above.)
A. Run it out of a cinder hole above the tapping-hole.
Q. Did you take it out of the tapping-hole at that time in March?
(Objected to by counsel for defendants.)
A. No, we made a hole above the tapping-hole and run it out of that.
Q. How much iron did you make?
(Objected to by counsel for defendants, for same reason as above.)
A. I don't know.
Q. How do you charge the runners now when you make iron?
(Objected to by counsel for defendants, reason same as before.)
A. We have made none for a long time; when we did use them, we took them as they came and put in large and small, and if tremendous large, we broke them.
345 Q. How large have you seen them?
(Objected to be counsel for defendants.)
A. Have seen them weighing five or six hundred.

OWEN MULLHANNON.

Exhibit H, H, G, March 19th, 1875.—Furnace-runners bought by H. Hamilton & Co.

1873.			
July 3 to October 1,	from M. Degan	187	tons.
In August	" J. Warren, Mineral Ridge	22½	"
" September	" " " " "	33½	"
" October	" " " " "	44½	"
" November	" " " " "	118½	"
" July	" Himrod Furnace Co., Youngstown	17¾	"
" September	for cash	13½	"
" October	" "	6	"
" "	from Jno. Shaley, Wheatland	77½	"
" Nov.	for cash	32	"
" December	from S. Parish, Niles	49	"
" "	" Jno. Shaley, Wheatland	23½	"
" "	for cash "	¾	"
" "	from Jno. Shaley, "	73½	"
1874.			

" January	" " " "	151	"
" "	" M. Degan, "	18½	"
" February	" Jno. Shaley "	81¾	"
" "	for cash "	8¾	"
" "	" " "	9½	"
" March	from Jno. Shaley "	11½	"
346 In March	from P. Kennedy, Youngstown....	9	tons.
" "	" D. Downan, Wheatland.....	42½	"
" April	" Jarid Warner, Mineral Ridge.	68½	"
" "	" D. Downan, Wheatland.....	152	"
" May	" Girard Iron Co., Girard.....	120	"
" "	" Hubbard " " Hubbard....	30	"
" "	for cash	5	"
" "	from D. Downan, Wheatland.....	106	"
" June	for cash.....	31½	"
" "	from D. Downan "	117	"
" July	for cash.....	33	"
" "	from Hubbard.....	12	"
" August	" Jno. Coyle, Lowell.....	11	"
" "	for cash.....	26	"
" September	" "	7	"
" "	from Jno. Coyle.....	10	"
" October	for cash.....	4	"
" November	" "	24	"
" December	" "	1	"

Iron made from furnace-runners.

March, 1873	2,200
September	18,720
October	230,268
November	242,515
December	321,084
January, 1874	34,020
May & June, "	434,270
January, 1875	170,575

Torn } 705,948, pig-metal bought between March & October, 1873.
out. } 709,830, " used in cupola " " "

347 In the circuit court of the United States, northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON & CO.

Depositions of witnesses taken in the above-entitled cause, now pending in the circuit court of the United States in and for the northern district of Ohio, in equity, taken on the part of defendants at the office of N. B. Hatch, esq., at No. 189 Penn st., Pittsburgh, Pa., on this 19th day of August, 1875, in pursuance of the notice hereto attached, and at the time and place therein mentioned. Present on part of plaintiff, A. McCallum, esq.; on part of defendant, Tho's W. Sanderson.

N. B. HATCH, of lawful age, being first duly sworn as hereinafter certified, deposes as follows:

Question (by defendants' att'y). State your name, age, and your place of residence.

A. My name is N. B. Hatch; my age is fifty-six years; my place of residence is Allegh*a*ny City.

Q. State what is your occupation and business, and how long has that been so.

A. My business for the past 18 years has been the management of real estate; at present and for some time past I have been also engaged in the investigation of iron, and at present am the engineer of a company that is erecting works for refining iron.

Q. State what experience, if any, you have had in the smelting of iron and the management of iron works, and state where and when.

348 A. I commenced the running a blast-furnace about 1844 and followed it for several years in Venango County, in the State of Pennsylvania, and afterwards was connected with a foundry and machine shop in the city of Pittsburgh.

Q. Are you acquainted with the nature and composition of a material commonly called trough runners of blast-furnaces?

A. I am.

Q. State what experience, if any, you have had or observed in smelting these runners for the purpose of extracting therefrom the metal'ic iron contained in them.

(Objected to by plaintiffs' counsel as leading.)

A. We had, in connection with our smelting furnace, a cupola in which we used up our runners and other scrap-iron left from the castings of the pig-iron.

Q. State who you mean in the last answer by we, and where it was you had the cupola and when.

A. By we I mean myself and my then partner, D. P. Hatch; and the location of the cupola was at Jackson Furnace, Venango County, Pa., previous to and after the year 1844.

Q. Please state, as nearly as you can, the year in which you located the cupola referred to at that furnace, and about the length of time you operated it for the purpose aforesaid.

A. About the year 1844, and operated it some 3 or 4 years.

Q. What kind of a furnace was that?

A. A charcoal furnace, and part of the time we used stone coal and coke as an experiment; it was a cold-blast furnace.

349 Q. Please state about the size and mode of construction of the cupola referred to by you and how it differed in any respect from the ordinary foundry cupolas then or now in use.

A. The cupola was of rather small size, about the kind then used in the country, but they are building them much larger now. There is no difference in the material shape. Our blast entered at one tuy're, and we used a falling bottom.

Q. Please explain the operation and mode by which you melted the runners and scrap, refer'ed to, in the cupola, viz, how you charged the material and formed the burden; what material you used as fuel or flux, and in what proportions.

A. Part of the time we used charcoal, and part of the time we used coke made from stone coal as fuel, as was most convenient at the time. We used limestone as a fluxing material, charged in the usual way for charging a cupola, first placing a sufficient amount of fuel to heat up the hearth or bottom of the cupola; when ready, the scrap-iron and limestone were mixed together charged on the top of the fuel. Can't say in what proportions we used the material as we never weighed it.

Q. State what you made of the material thus melted.

A. We cast it into plow-points and hollow-ware; such as skillets, pots, and Dutch ovens.

Q. When using these runners and scrap which you have mentioned, state whether you used them by themselves or melted pig-iron with them.

A. They were used by themselves as long as they lasted, and then we used pig-iron if necessary to fill orders.

350 Q. State whether or not it was generally known in and about the neighborhood where the Jackson Furnace was located that your firm was melting runners made at that furnace, and making hollow-ware, &c., from them, as you have stated.

A. I believe it was known all around the furnace, as we made no secret of it.

Q. Please give your best judgment and opinion as to the number of tons of trough-runners that were used by your firm for the purpose of being melted in that cupola during the time you operated it.

A. I cannot tell, as we never weighed anything but the merchantable pig-iron; occasionally we worked up our boils.

Q. State what personal knowledge you have, if any, as to any other person or persons, at or about the time you have mentioned, or since, and prior to the first day of October, 1873, utilizing or using furnace trough-runners by means of cupolas of the same kind or similar to the ones you used.

A. The only one I personally know of is at the Superior Iron Works, in Alleghany County, in this State, and, to the best of my knowledge, they were operating it about four years ago. Mr. Norris, the party in charge there, told me it was a common thing in England to economize their scrap in that way.

(Objected to by plaintiffs' counsel as to what Mr. Norris said to deponent. The counsel for the plaintiffs also objects to the whole of the foregoing testimony for the reason that it was not alleged in defendant's answer that this witness had prior knowledge of the invention claimed in the patent of John J. Vinton, or had used the same.)

351 Cross-examined by A. McCallum, counsel for plaintiff:

Q. What became of the cupola furnace which you say you had at the Jackson Furnace about the year 1844?

A. It was torn down when the furnace went out of blast in the year 1845 or '46.

Q. Since the period you mention, 1844 to 1846, have you been in any way engaged in or about a blast-furnace?

A. Nothing beyond being a close observer of their operations.

Q. You say in your direct examination that you are acquainted with the nature and composition of what is called trough-runners; please describe what they are composed of.

A. The trough or gutter connecting the pig-beds with the notch of the furnace hearth is generally larger and deeper than the sow or general runner, which feeds the iron into the moulds or grooves in the pig-beds. When the metal is first let into the trough or runner it accumulates so as to fill it nearly to the brim. As the flow from the notch of the hearth decreases, the iron and slaggy matter which has been chilled by coming in contact with the cold surface of the trough remains adhering to the sides of the trough, the bottom part of it being considerably thicker than the sides of the shell thus formed, and intermixed more or less with the sand of the trough, the slag of the iron, and not unfrequently mixed with unreduced particles of iron, forced through the

notch of the hearth towards the close of the flow or letting out the metal. Sometimes this material extends beyond the trough a considerable way into the sow or trench which distributes the iron into the moulds for the pigs.

352 Q. Do I understand, then, that these trough-runners are in the form of a shell, corresponding to the shape of the trough or runner, thicker at the bottom than the sides?

A. Not always so. It depends on the working of furnace. If working lively they are not so thick, and when the furnace is working badly they are thicker.

Q. If you can, please make diagram of the trough with the metal in it.

A. I will try to do so, but can only represent it in sections, but not in length, for its shape is sometimes varied by wash or flow of the metal, and unskillful construction of the trough or trench. The full line shows the form of the trench or gutter, and the dotted lines show the condition of the trough or runner after the flow, and is varied more or less by the condition of the stock passing through it.



Q. In a charcoal furnace running on cold blast, do you make such runners as you have here depicted?

A. Not always. If the furnace is working well and lively the shell will be thin, provided there has been sufficient fall preserved in the trough, otherwise the shell would be thicker, and if the stock passes rapidly unreduced iron will be formed in it in more or less quantities.

Q. Would there be any difference in the result if coke and coal were used instead of charcoal?

A. The general result would be the same, having reference to the greater deposit of earthy matter abounding in the coke fuel.

Q. Would there be any difference in the general result if hot blast were used instead of cold blast?

353 A. The only difference would be that the caloric of the hot blast would, to a certain extent, lessen the amount of coke used, and to that extent would consequently decrease the deposit from the coke in the form of slag.

Q. In your opinion there would be a smaller proportion of slag mixed with the iron in the runner through the use of the hot blast than with the cold.

A. Not necessarily so, for the furnace might be overburdened, and the slag or cinder arising from the overcharge of iron ore would more than equal the ash or cinder from the deminished coke.

Q. Suppose a furnace working grey iron charged with proper proportions, and operated by the hot blast, another furnace charged with its proper proportions and working grey iron, and operated by the cold blast, which in your opinion would make the most slag, and have the most slag in the runners?

A. Provided the materials were the same, and the proportions the same, there would be most slag in the runners proportionally from the cold blast, for the reason that a larger amount of coke would be used, and consequently that much more residuary matter in the form of cinder from the coke must be deposited.

Q. In your direct examination you have spoken of scrap-iron; what is scrap-iron, referred to?

A. Anything which does not pass as merchantable pig-iron I would designate as scrap-iron.

Q. Would you designate the material you have been speaking of as trough-runners as scrap-iron?

A. It might be designated as scrap of a very low grade and I
354 would class it as to value with a material that is called boils, where the sand and loam is mixed with the iron by the agitation of boiling.

Q. You have spoken of trough-runners, or mixture of slag and iron, as being of different qualities; what percentage of iron does it usually contain?

A. It varies from 40 to 50 per cent., and sometimes as high as 80 per cent.

Q. In your experience in the use of this material did you put it all into the cupola, or did you select it?

X A. Sometimes we would break it up, and jar the cinder from it as much as we could before melting it in order to save the fuel, and sometimes we used it as it was when there was not too much cinder attached.

Q. You have stated in your examination that the furnace-runners contained unreduced iron; what use do you make of this particular form of iron?

X A. By unreduced iron I mean or understand iron that has not assumed a fluid form sufficiently to allow to flow free from it' matrix, or earthy mould, and pass into the fluid mass in the hearth. We used that just as we done the rest in the cupola.

Q. Why did you not put the runners back into the blast-furnace and make pig-iron of them?

A. Because it was more convenient to melt them in the cupola, and as we found that it received sufficient carbon from the fuel while passing through the cupola to assume the conditions or *or* qualities of pig metal.

355 Q. What would be the effect on this material if put back in the blast-furnace in the charge with the ore?

A. If the charge was not too much increased by the addition of *of* the daily production of trough-runners and scrap metal, and was divided among the charges regularly, it would not materially effect the quality of the iron, but if the same amount of fuel was added along with the extra burden that is required for reduction or melting in the cupola, it could be all used in the blast-furnace.

Q. How long does it take to make iron from runners in a cupola furnace?

A. About the ordinary time for melting iron in cupolas.

Q. Does it take a larger or shorter period of time to make iron from the runners if put back into the blast-furnace than into the cupola?

A. It can be melted sooner in a cupola than in a blast-furnace.

Q. Where did you get the coke you say you used in 1844?

A. The coke was make on our furnace bank under my own supervision. The coal was brought about ten miles from Festig's bank.

Q. Did you ever cast pig-iron from the cupola furnace?

A. When we had more metal in the cupola than we had moulds to fill, we cast it into pig-iron.

Q. When did you last see Mr. Norrich?

A. I think the last time I saw Mr. Norrich was on yesterday.

Q. How long have you known him?

356 A. I knew the man for several years, but did not know him personally until recently—say for a few days past.

Q. You say that you are at present the engineer for a company erect-

ing works for refining iron. Where are these works located, and who are the company?

A. The works are located at the corner of 27th and Railroad streets, in the 12th W., Pittsburgh. The company is a stock company and I cannot tell you all the names of the stockholders; it is called the "Iron Refining Co., Pittsburgh."

Q. Do you know Homer Hamilton, the defendant in this suit?

A. I do not.

Q. Have you ever been waited upon by any person representing that firm regarding the testimony you have given in this suit?

A. A gentleman by the name of Harris called on me some two months ago, and afterwards I received a notice to appear and give testimony, he having first inquired as to what I knew, and what I had done with our scraps and trough-runners.

Re-examination.

Q. State where now your brother D. P. Hatch is, who was connected with you in operating the Jackson Furnace, in Venango County.

A. He is residing in this county at a place called Squerrel Hill, I think within the city limits.

N. B. HATCH.

357 In the circuit court United States, northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON ET AL.

Rebuttal testimony taken in behalf of John J. Vinton et al., by consent and agreement of counsel, and notice hereto annexed, before Joseph N. McClure, a notary public in the borough of Sharon, Mercer County, State of Pennsylvania.

Now, Monday, August 23, 1875—present A. McCallum, solicitor for complainants; Thomas W. Sanderson, solicitor for defendants, not being present—at 10 o'clock a. m., August 23rd, 1875, the taking of the testimony adjourned until one o'clock August 23rd, 1875.

Met pursuant to adjournment. Present, A. McCallum, solicitor for complainant, and Tho' W. Sanderson, attorney for defendants.

JOHN DARBY, being duly sworn, deposes and says, in answer to the following interrogatories:

Q. What is your name, age, and occupation, and residence?

A. My name is John Darby, am thirty-one years old; reside in Youngstown, Ohio; am a moulder by trade and occupation.

Q. How long have you been in that business, and in whose employment have you been in the last five years?

A. Have been in the business since I was fourteen years old. I worked with Abell Dore and Co., known as the "Mahoning Stove Co.,"
358 in Youngstown, for two weeks, when I first came to this part of the country. This was in the year of 1871. I then went to Cleveland, and worked for about one year at the Cuyahoga Works. I came to Youngstown, Ohio, and commenced to work for Homer Hamilton and Co. the first week in January, A. D. 1872, and continued working for them until the latter part of October, or the first part of November, A. D. 1873. Work got slack, and I worked after this time at different places; worked several times for Homer

Hamilton since the months of October, 1873. I am at present in no employment.

Q. During the time you speak of, from January 1st, 1872, to November, 1873, did you have constant employment at the foundry of Homer Hamilton & Co.?

A. I was not there all the time; was there all the time they were working.

Q. Were you working in Homer Hamilton's new or old shop?

A. I worked in both of them.

Q. Were you there at the time they removed from the old to the new shop?

A. Yes, sir.

Q. How long did you work at the old shop before you went to the new shop?

A. Eight or ten months; worked at the old shop until about March, 1873, when they moved up to the new shop.

Q. Did they use the cupola in the old shop after they moved to the new shop?

A. I do not know; was never there after they moved.

Q. Do you know the slag material, commonly called runners, or blast-furnace runners, when you see it?

359 A. Yes, sir.

Q. During the time you worked in Homer Hamilton's old furnace, or shop, or foundry, did you see any of this material called furnace-runners in their yard?

A. No, sir.

Q. Before or about the time of removal from the old shop, did you see any one digging this material and hauling it away from the yard of the old foundry?

A. No, sir.

Q. If such a thing had been done, would you have been likely to have seen it?

(Objected to by Thos. W. Sanderson, attorney for def'ts.)

A. Yes, sir; it is not likely that it could have been done without me having seen it.

Q. During the time you were at work in the new foundry, from the spring until October, did you ever see them putting this material called furnace-runners into the cupola, or making pig metal or castings from it?

A. No, sir.

Q. During that period, were you in the habit of getting metal from the cupola for making your castings?

A. Yes, sir; every day when they were melting.

Q. Did you ever see them using this material, furnace-runners, in their cupola? If so, state when it was.

A. Yes, sir; I saw them use it after I left them. I went to get my pay a few days after I left, and saw them using it; that was the latter part of October, or first of November, 1873.

Q. In the spring or summer of 1873, did they have any of these furnace-runners piled up in their yard?

360 A. I do not know; I did not see it.

Cross-examination by THOMAS W. SANDERSON:

Q. There might have been several tons of it piled up about their foundry when you went there, and during the time you worked there, and you not have known it, might there not?

A. There might have been.

Q. What is it that you say you did not see them dig up and haul away from the old foundry to *to* the new one after they moved?

A. Slag or furnace-runners.

Q. You say you were not at the old foundry after they moved. If that be so, how can you tell what was dug up and hauled away from there afterwards?

(Objected to for the reason that the witness, in answering the question in the direct examination said that he had not seen any of this material dug up and hauled away prior to or about the time of removal, and did not refer to anything that transpired after the removal from the old foundry.)

X A. Because I walked by the yard every night and morning, and sometimes through the yard.

Q. In doing that did you, at any time, make any examination in order to see whether anything had been dug up and removed from that yard?

A. No, sir; it was none of my business.

Q. Was it any of your business what kind of material was
361 filled into the cupola while you worked in the old foundry?

A. No, sir.

Q. Did you at any time make any examination while you worked at the old foundry for the purpose of seeing what kind of material it was that was used in it?

A. Yes, sir; lots of times.

Q. Where did you go to make this examination?

A. Out in the yard.

Q. Was it while they were filling the cupola?

A. I don't remember, sir, anything about that.

Q. Then, what you mean to say is, that you simply examined the material in the yard?

A. Yes, sir.

Q. Where were you generally when the cupola was being charged before casting?

A. Would be working sometimes in the foundry and sometimes out.

Q. While you worked at the old foundry who did the work at charging the cupola, and who superintended it?

A. I do not know, sir.

Q. Did you do either?

A. No, sir.

Q. Did you ever stand by and see anybody else do it?

A. No, sir.

Q. You are not able to swear then, are you, that there was not a large quantity of runners used in that cupola at the old foundry while you worked there?

A. No, sir.

362 Q. And all you mean to say is, that you never saw any piled up in the yard, or hauled away from there to the new foundry; is that so?

A. Yes, sir.

Q. Why did you leave the employment of Homer Hamilton and Company?

A. Because they had nothing more for me to do, I suppose.

Q. Had they ceased running their foundry when you left?

A. They laid off for slack of work, and went to work to make pig-iron.

Q. At that time, were they making no castings or machinery?
A. They were making castings when I left.
Q. And you were employed, were you not, as a moulder for making castings?
A. Yes, sir.
Q. Where did you ever see any furnace-runners?
A. Several places.
Q. Mention some of the places?
A. I saw a lot of them at Vinton's new furnace, at Sharon, and several places.
Q. Had you ever seen any before you worked for Homer Hamilton & Co.?
A. Yes, sir; many years before that.

Redirect:

Q. The castings you refer to as being made at the time you left Homer Hamilton, or after that time, were they ordinary castings or pig-iron?
363 A. They were ordinary foundry castings when I left, and after that I saw them making pig-iron.

his
JOHN + DARBY.
mark.

Attest:
J. N. McCLURE.

ALFRED N. CURTIS, being duly sworn, deposes and says in answer to the following interrogatories.

Q. State your name, age, and residence, and occupation.
A. My name is Alfred N. Curtis; am forty-eight years old; reside at Sharon; and am by occupation a coal dealer.
Q. Have you had any practical operation in blast-furnaces?
A. I have had none.
Q. Have you had any experience with foundry cupola furnaces?
A. None.
Q. Do you know Homer Hamilton?
A. I have no personal acquaintance with him.
Q. In defendant's answer to the bill of complaint in this cause, Homer Hamilton makes oath that upon his personal knowledge and upon information and belief *that* you have used material called furnace-runners, or runners from blast or smelting furnaces, in exactly the same way and manner, and by exactly the same method and process in which said runners now are and have been used by the defendants Homer Hamilton & Co., and in the testimony given by Homer Hamil-
364 ton in this cause he says he uses this material in a foundry cupola. Is this statement regarding your knowledge as to the use of this material correct?
A. I have no knowledge of the management or working of the furnace I am interested in, and did not know that furnace-runners were worked until after this suit was commenced.

ALFRED N. CURTIS.

GEORGE BOYCE, being duly sworn, deposes and says in answer to the interrogatories as follows:

Q. What is your name, age, residence, and occupation?
A. My name is George Boyce; age, seventy; reside at Sharon, Pa., and by occupation pig-iron manufacturer and coal operator.

Q. How long have you been engaged in and interested in the iron business, and what experience, if any, have you had with blast-furnaces naming the furnaces with which you are or have been connected?

A. I have been interested in the manufacture of pig-iron for twelve years past. Have taken no personal superintending of a blast-furnace. Have been interested in the Sharon Furnace near Sharon, Pa., and the two Shenango furnaces at Middlesex, Pa.

Q. Have you had any experience with cupola furnaces?

A. None whatever.

Q. Do you know the material known as furnace-runners, or slag found in the runner after casting?

365 A. Yes; I do.

Q. Prior to October, 1873, did you ever see or hear of this refuse material being used in a foundry cupola, for the purpose of making pig-iron or castings therefrom?

A. No.

Q. Prior to that date did you ever know of this material being dug up and utilized from the cinder piles where it had been thrown away?

A. No.

Q. Do you know how much fuel it takes to make a ton of pig-iron?

A. Yes, from two and a quarter to three tons of coal. Do not know the proportions of coke, but think it *it* would take about thirty to thirty-four hundred pounds.

Q. Do you know if any of this material called furnace-runners has been used along with ore in the blast-furnaces in which you are connected?

A. Yes.

Q. Do you know how it is used?

A. I know that it is usually thrown away, but *but* have known an instance when it was saved until the end of a blast, and then used in the furnace, nearly at the end of the blast with ore; am not able to say what proportions of fuel was used; was so informed by the manager.

Q. You have stated that it takes from two and a quarter to three tons of coal, or from thirty to thirty-four pounds of coke to make a ton of pig iron from the ore. In your opinion would it take more or less fuel to make a ton of iron from this slag?

366 A. I would not like to give an opinion, as I have no practical knowledge.

Q. Suppose a foundry cupola to be charged with forty thousand pounds of runners, in fifty charges of eight hundred pounds each, and sixty-eight hundred pounds of coke, and that the product was ten tons of merchantable pig-iron, or in other words, that it took six hundred and eighty pounds of coke and four thousand pounds of slag or runners to make a ton of iron, would not that in your opinion be a more economical method of extracting the iron from the runners than if the same amount of material were charged along with ore with the usual amount of fuel in a blast-furnace?

(Objected to as leading).

A. Yes, sir; it would.

Q. Do you know Homer Hamilton, one of the defendants in this suit?

A. Yes, sir; I met him once only.

Q. In defendants answer to the bill of complaint in this case, Homer Hamilton makes oath that upon his personal knowledge and upon information and belief that you have used material called furnace-runners, or runners from blast or smelting furnaces, in exactly the same way

and manner, and by exactly the same method and process in which said runners now are and have been used by defendants Homer Hamilton & Co., and in the testimony of Homer Hamilton in this case he says
367 he uses this material in a foundry cupola. Is this statement regarding your knowledge as to the use of this material correct?

(Objected to.)

A. No; it is not correct. I never so used it.

GEORGE BOYCE.

FREDERICK DAHRIENGER, being duly sworn, deposes and says, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. I am twenty-seven years old. My name is Frederick Dahrienger. Reside in Sharon; am a keeper at the Westerman Iron Company's furnaces in Sharon, Pa.

Q. Do you know John Enwright, of Sharon, Pa.?

A. Yes, sir; I do.

Q. Did you ever have any conversation with him on the subject of melting furnace slag? If so, state when it was, and what he told you about it.

(Objected to because not asked of Enwright.)

A. About one year ago last March—that is, in March, 1874—he told me that he had a patent for melting these slags. Said that he brought with him an English patent and deposited it in Washington, and that he had five years to work on it, if he wanted it take it out, and that his time be up last February.

Q. Did he say anything about Mr. J. J. Vinton or W'm McGelvray?

(Objected to.)

A. He said he could stop them from working the slag.

FREDERICK DAHRIENGER.

368 THOMAS E. BLUNT, being duly sworn, deposes and says, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is Thomas E. Blunt; am forty-nine years old; reside at Sharon, Pa.; am a superintendent of blast-furnaces.

Q. How long have you been interested in the iron business connected with blast-furnaces, naming the furnaces with which you are or have been connected.

A. I have been connected with the iron business about six years. The furnaces are located near Sharon, Pa., and were formerly owned by Otis Iron Company; now owned by Stewart Iron Co.

Q. Have you had any experience as to the construction and operation of foundry cupolas?

A. I have not.

Q. Have you ever made iron from the slag-runners or other refuse material which had been previously thrown out, from the cinder piles or dumps of furnaces with which you are connected?

A. No, sir.

Q. Prior to October, 1873, did you ever hear or see such refuse material or furnace-runners used in a foundry cupola for the purpose of making iron therefrom?

A. I think it was in September, 1873, that William McGilvray sent down his wagon with instructions from Mr. J. J. Vinton to get some of the slag to try it in the cupola; that is the first knowledge I had of it.

Q. What is the usual charge of a hot-blast-furnace when coke

369 is used as fuel? Give particulars how you proceed to blow in the furnace and charge it after it is in blast.

A. In the first place we use about six cords of wood; then we put in from five to ten tons of coke; then we put in a proportion of ordinary furnace cinder; then we commence and charge ore, coke, and limestone until the furnace is full. At first we charge light, about three hundred pounds of ore to about five hundred pounds of coke. We use about eighteen per cent. of limestone. This is when we are starting the furnace; when the furnace is working we increase the burden of ore. The burden is regulated by the quantity of iron produced.

Q. Suppose you were to make up a charge with the material which is now known as furnace-runners instead of ore; what change, if any, would you make in proportions of fuel and fluxing material as compared with ore?

A. I would make none in the fuel, but think it would require less limestone.

Q. Then, in your opinion, it would take as much fuel to recover iron from this slag material called runners in a hot-blast furnace as it would take to reduce the iron from the ore?

A. Yes, sir.

(Answer objected to.)

Q. How long does it usually take for a charge to come through a stack of a blast-furnace?

A. About thirty hours.

Q. Suppose a charge to be made up of runners instead of ore,
370 would it take as long or longer, or the same time, to come through the stack as the ore, in your opinion?

A. I think it would require about the same time.

Q. How much coke does it usually take to make a ton of pig-iron in a blast-furnace of ordinary ore?

A. It takes about thirty hundred pounds of coke.

Q. Does that calculation include the quantity of coke required as a bed in starting or blowing in the furnace?

A. It does not include the quantity required to start the furnace; the calculation is based on the quantity required when the furnace is running.

Q. Suppose a foundry cupola be charged as follows: First, twenty bushels, or eight hundred pounds, of coke for the bed; then with fifty charges, each composed of eight hundred pounds, of slag or furnace runners, and three bushels, or one hundred and twenty pounds, of coke, and a small quantity of limestone and other materials, making in the aggregate sixty-eight hundred pounds of coke and forty thousand pounds of slag, and that the product was ten tons of merchantable pig-iron; or, in other words, that it only took six hundred and eighty pounds of coke and four thousand pounds of slag to make a ton of iron, and that the whole process only occupied about five hours to make the ten tons; and suppose that the same quantity of runners were
371 charged in a blast-furnace with the quantity of fuel which you have stated as required for their reduction in the blast-furnace, to wit, the same proportions as for ore; which process, in your opinion, would be the best, quickest, and most economical for the recovery of the iron from the slag, the blast-furnace or the cupola?

(Objected to.)

A. The cupola; because in the cupola it would only take six hundred and eighty pounds of coke to make a ton of iron, and in the blast-furnace it would take thirty hundred pounds of coke. The quickest

way would be in the cupola, as it requires thirty hours for the slag to go through the blast-furnace, and only five in the cupola.

THOMAS E. BLUNT.

SAMUEL KIMBERLY, being duly sworn, deposes and says, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is Samuel Kimberly; am fifty-seven years past; reside in Sharon, Pa.; and am engaged in the iron and coal business.

Q. How long have you been engaged in the iron business, and what experience have you had with blast-furnaces?

A. Have been engaged in the iron business and in blast-furnaces for about twelve years, to wit: the Eagle Furnace at Youngstown, Ohio; a portion of the time, to wit, from the years 1863 to year 1870, Wampum Furnace, Etna Iron Company, and Keel Ridge Furnace.

372 Q. Have you had experience as to the construction and operation of foundry cupolas?

A. No.

Q. Do you know the material commonly known as slag or runners produced in the operation of the blast-furnace?

A. Yes.

Q. Prior to October, 1873, did you ever see or hear of this material being used in a foundry cupola for the purpose of making iron therefrom?

A. No.

Q. Prior to that date, October, 1873, did you know of this material being dug the cinder piles, on which it had been thrown out as refuse material, for the purpose of making iron from it in the blast-furnaces?

A. I never heard of it being used in a furnace at any place until after I sold my furnace to Kimberly, Carns and Co., which was, I think, in September, 1873. The first I heard of it was at Wheatland, some time in the winter of 1873 and 1874.

Q. What is the usual charge of a hot-blast furnace when coke is used as fuel; how is the burden made up?

A. Our furnaces use four hundred and twenty-five pounds of coke to four hundred and ninety pounds of ore.

Q. Suppose you were running on cold blast instead of hot blast, what difference in fuel would be required in quantity?

A. I do not think it could be done at all, but if it could,

373 it would take double the quantity.

Q. Suppose you were to make up a charge with slag or furnace runners instead of ore; what change, if any, would be required in proportions of fuel and fluxing material, in your opinion?

A. Since this slag business came out I have desired our furnaceman to use it, but he does not like to do so on account of the difficulties which might result. I do not think that it would require any more fuel.

Q. How long does it usually take for a charge to come through a furnace, or through the stack of a blast-furnace?

A. From twenty-four to thirty-six hours.

Q. Would a charge of runners take as long a time to come through as a charge of ore?

A. I do not know.

Q. How much coke does it take to make a ton of pig-iron in a blast-furnace with ordinary ore?

A. About thirty-two hundred pounds.

Q. Suppose a foundry cupola to be charged in the course of a heat with forty thousand pounds of runners and sixty-eight hundred pounds of coke, with a small quantity of limestone and other materials, and that the product was ten tons of pig metal, or that it only took six hundred and eighty pounds of coke and four thousand pounds of runners to make a ton of iron, and suppose it would take three thousand pounds of coke and the usual quantity of this material called furnace-slags as of ore to make a ton of metal in a blast-furnace; which
374 process would be the best, quickest, and most economical for the recovery of the iron in the slag, the blast-furnace, or the cupola?

(Objected to.)

A. The cupola would be as six hundred and eighty is to thirty hundred in favor of the cupola.

Q. Do you know Homer Hamilton, one of the defendants in this suit?

A. Yes.

Q. In defendants' answer to the bill of complaint in this case, Homer Hamilton makes oath that upon his personal knowledge, and upon information and belief, *that* you have used material called furnace-runners, or runners from blast or smelting furnaces, in exactly the same way and manner and by exactly the same method and process in which said runners now are and have been used by defendants Homer Hamilton & Co., and in the testimony of Homer Hamilton in this case he says he uses this material in foundry cupola. Is this statement regarding your knowledge as to the use of this material correct?

(Objected to.)

A. No, it is not correct. I never used it in that way. I never used it at all until very recently.

SAMUEL KIMBERLY.

SEBASTIAN RUNSER, being duly sworn, deposes and says, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

375 A. My name is Sebastian Runser; am forty-seven years old; reside at Sharon, Penn'a; am engaged in manufacturing pig-iron under patent of Jno J. Vinton, or rather am preparing to manufacture iron from slag from the Vinton process.

Q. Are you personally acquainted with John J. Vinton, of Sharon, Pa., the patentee of process just referred to?

A. I am.

Q. How long have you known him?

A. About four years.

Q. Are you personally acquainted with John Enwright, of Sharon, Pa.?

A. I know him when I see him.

Q. When did you first meet him to know him?

A. In the summer of 1872, about the middle, I think.

Q. Who was with you at the time?

A. John J. Vinton.

Q. Please state all the circumstances of that meeting, how it occurred, when it was, and what conversation you had with Enwright.

A. At the time above stated, I one evening was driving out into the country. In driving past Mr. John J. Vinton's, I invited him to take a ride with me. On our way we discovered something like a cupola and a temporary building near by. I proposed to Vinton to stop and

see the improvement, and on entering the premises we discovered a man that I afterwards found out was the aforesaid Enwright. We entered into conversation with him, and we asked him what he in-
376 tended to manufacture. He told us that he was going to make ornamental castings and nails. On leaving the ground we discovered a pile of cinder, or what is now called runners. I asked him what that was for. He told me that it was to build a protection wall to keep the water from cutting away the ground under his building; knowing that the material was good for that purpose; I took it for granted that that was what it was for. We then left the premises. We had some convesation in regard to his foundry, but I had no knowledge, nor did said John J. Vinton say one word to me at that time in regard to slag, or the manufacturing of iron out of the same.

Q. Have you ever seen that establishment since?

A. Yes, frequently; saw it some six weeks ago.

Q. Was that cupola, or what appeared to be a cupola, ever in blast?

A. Not to my knowledge.

Q. So long as you have known it, was that cupola ever in a condition to be used for melting iron for the purpose of making castings?

A. It never was at any time that I saw it.

Q. Describe its condition.

A. It was a cilinder some six or eight feet long; don't think it was over six; perhaps thirty inches in diameter, and located about six or eight feet from this temporary building. There was no power creating the blast.

Q. From your knowledge of cupolas, would you consider it
377 practicable with such an erection as you have described to melt metal for the purpose of making castings?

A. I would not so consider it, and so expressed myself to Mr. Vinton when he saw it.

Q. Have you ever seen Mr. Enwright or any one else working in or about that improvement or erection at any of the other times you speak of having seen it?

A. I never did. It appears to be entirely abandoned.

Q. You have stated that you were at present engaged in the business of making or preparing to make iron from furnace-slag. Please give your experience in this slag business, what places you have found it in, and generally the conditions under which it was found.

A. As a general thing I have found it where mountain or lake ores have been used and coal or coke; where charcoal and native ores have been used, I did not find it in as large quantities.

Q. Have you ever examined any cinder-dumps of a blast-furnace in which you did not find slag containing iron which would pay to put through a cupola by the Vinton process?

A. Yes; I have found some cinder-dumps that did not contain enough material to pay the working of the dumps. Yet, at the same time, there might be large quantities of scrap and slag contained therein. All cinder-dumps have more or less of that material in them.

Q. The dumps you have examined, what do you generally find to be the result as to quantity of this description of cinder that
378 has been thrown away and treated as refuse material?

A. There is generally very large quantities.

Q. Name, if you can, the furnaces where you have examined cinder-dumps in the course of your business, and generally whether a large or small quantity of this material containing iron was found.

A. In the State of Pennsylvania I have examined the dumps of New

Castle, Middlesex, Sharon, and Sharpsville. Find them all to contain more or less iron-bearing slag. In the State of Ohio I have examined the dumps at Newburgh, Cleveland, and Massillon. Am now receiving on an average more than one car-load a week of slag, just as it comes from the furnace at Cleveland, which contains at least sixty (60 70) per cent. of iron. In the State of Indiana I have examined the dumps at five blast-furnaces. Am now mining the cinder at four of them, and have found it in large enough quantities to pay me for putting up an improvement for working the same. In the State of Missouri I have found it in large quantities (in St. Louis) South St. Louis, also some at Pilot Knob, an iron mountain. Along the Ohio River I have found it at Bellair', Martin's Ferry, Mingo, Steubenville and Irondale, and also at Leetonia, Ohio. In the State of New York I have found it in Buffalo and Black Rock. In the State of Kentucky
379 I have found it in Ashland in large quantities at two of the furnaces, and some at the charcoal furnaces. At Ironton, Ohio, I found a large quantity among the cinder. At Wheeling, Va., at Riverside Furnace, I found it there, and other places.

Q. Could you form any idea by a rough estimate of the quantity of this material in the dumps that you have seen?

A. I have not examined particularly enough to form an estimate of the whole number of dumps, but can speak as to those that I have particularly examined. I estimate that the dumps of the four furnaces at Brazil, Indiana, will yield at least six thousand tons. I know from receiving the cinder from one furnace weekly that it will produce five hundred and twenty tons of this slag in one year if she continues on the same as she has for the last two months. Some of the dumps and a major part of them that I have examined are from three to ten years old. I therefore judge that the amount is enormous in the aggregate, reaching thousands of tons.

Q. Prior to October, 1873, did you ever know or hear of this slag or iron-bearing cinder being utilized in any way?

A. I did not. The first time I ever saw or heard of its being utilized was at the foundry of Wm. McGiloray and Co., in Sharon, Pa., by John J. Vinton aforesaid.

SEBASTIAN RUNSER.

Now August 23, 1875, adjourned to Tuesday, Aug., 24th, 1875.

380 Now August 24th, 1875, met in pursuance to adjournment.

BARNARD BRANON, being duly sworn, says, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is Bernard Branon; am fifty-six years old; reside in Sharon; am a boiler-maker by trade.

Q. Do you know John J. Vinton, of this town (Sharon, Pa.)? If so, how long have you known him?

A. Yes, sir; I have known him for two or three years, but have not been personally acquainted with him quite that long.

Q. Do you know John Enwright, of this city? If yes, how long?

A. Yes, sir; have known him for two or three years.

Q. Have you ever had any conversation with Mr. Enwright about the slag business in which said J. J. Vinton is engaged? If so, state particularly the conversation you have had with him, when, and where it was.

(Objected to because not enquired of Enwright.)

A. I have been engaged in the business of gathering the slag. Mr. Enwright came to me when I was gathering slag in the summer or fall of 1874 and wanted me to gather the slag for him and store it upon the flats. I told him that I could get the money for it from Mr. Vinton as fast as I dug it up. Some days afterwards when
381 I was going to dinner I met him, and he took me into his house and said he was going to have a good thing of this. I told him that I like to see everybody make money. He said that Homer Hamilton had his lawyer over here, and that he, Enwright, was going to make a good thing out of it.

Q. Did Enwright say what he was going to do with Vinton and Co.? (Objected to.)

A. Yes; he said he was going to knock them higher than a kite, or words to that amount.

Q. Did he tell you how he proposed to make a good thing of it?

A. He said that he would throw his influence to Homer Hamilton, of Youngstown, Ohio, and that he, Homer Hamilton, would make a good thing of it to him.

B. BRANON.

JOHN FISHER, being duly sworn, doth depose and say, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is John Fisher; am fifty-three years old; reside in Sharon, Pa.; am interested in the iron business.

Q. Are you one of the plaintiffs in this suit?

A. Yes, sir.

Q. Do you know Homer Hamilton & Co., defendants in this suit?

A. I do not.

Q. Have you ever visited their place of business?

A. I have.

Q. State when it was and what your object was.

382 A. I went to Youngstown sometime in March, 1874, as near as I can recollect, to see Homer Hamilton concerning this slag business. In looking around his foundry I saw quite a large pile of this slag. Saw a man working them, and asked him what they were doing with that slag or cinder. He told me that they were making it into pig-iron. He asked me if I had any of it to sell. I told him that I had considerable of it on hand. He said Homer Hamilton would buy all that I could bring, and pay me a good price for it. I asked him how long he had been working for the firm of Homer Hamilton and Co., and he said some eight or ten years. I asked him when they commenced working this slag. He said they commenced working it in October, 1873.

(Whole answer objected to as incompetent.)

JOHN FISHER.

NORMAN HALL, being duly sworn according to law, doth depose and say, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is Norman Hall; am forty-five years old; reside at Sharon Furnace, in Hickory Township, Mercer County, and State of Pennsylvania; my business is manufacturing pig-iron.

Q. How long have you been interested in the iron business, and what

experience, if any, have you had with blast-furnaces, naming the
383 furnaces with which you are or have been connected?

A. I have been connected with the iron business for twenty-four years. My experience has been entirely with blast-furnaces, to wit, the Marretta Furnaces and the Sharon Furnace.

Q. Have you had any experience in the construction and operation of foundry cupolas?

A. None whatever.

Q. Do you know the material now known as furnace-runners or slag, mixed with iron, which is left in the trough after casting?

A. Yes.

Q. Prior to October, 1873, did you ever know or hear of this material being used in a foundry cupola for the purpose of making iron or castings therefrom?

A. No.

Q. Prior to October, 1873, did you ever know of this material being dug up from the cinder dumps of blast-furnaces, or other places where it had been thrown out, for the purpose of being utilized in a furnace of any kind?

A. I have no knowledge of it having been so dug or used until within the last year or two, without fixing the date.

Q. Within your knowledge who was the first who commenced to operate on these dumps for the purpose of recovering this material?

A. I only know of our own dumps, which were first operated for this material by the Vinton Iron Co.

Q. What is the usual charge of a hot-blast furnace when coke is used?

384 A. I have never used coke for fuel.

Q. What amount of coal do you use for a charge of ore?

A. From one hundred per cent. to one hundred and twenty per cent.; it varies; the amount is not fixed.

Q. Suppose you were to make up a charge with furnace-runners or this slag instead of ore, what difference, if any, would be required in the amount of fuel, in your opinion?

A. In a blast-furnace where the slag was used as an occasional charge no excess of fuel would be required. For a continuous use it would require more fuel.

Q. How long does it usuall' take for a charge to come through a blast-furnace?

A. It varies with the hight*h* and size of a furnace. At the Sharon Furnace it requires twenty-two hours, the hight*h* of the furnace being forty-six feet.

Q. Suppose such charge to be made up of slag or runners, would it take any longer or less time for a charge to come through?

A. In my opinion it would take less time than the ore charge, probably about three hours.

Q. Suppose a foundry cupola to be charged in the course of a heat with sixty-eight hundred pounds of coke, and forty thousand pounds of runners, charged at different times, and that the product was ten tons of pig-metal, or that it took only six hundred and eight pounds of coke to make one ton of pig-iron from this material, would you consider that a more economical method of extracting the iron from the slag
385 than if it were charged or put back into a blast-furnace like ore, and with the proportions of fuel required for the reduction of the ore?

A. Everything else being equal, I consider the foundry cupola method the most economical (as in the case supposed in the question).

Cross-examination:

Q. How many and what furnaces have you been connected with, and where located?

A. Maretta Furnace, Lancaster County, Pa., and Sharon Furnace, Mercer County, Pa.

Q. Where have you been doing business for the past three years?

A. At the Sharon Furnace.

Q. During two years prior to October 1st, 1873, what furnace did you operate?

A. Sharon Furnace.

Q. Did you ever know, prior to October 1st, 1873, of furnace-runners being put back into the furnace and melted with the ore?

A. Yes.

Q. Where was this at?

A. At the Sharon Furnace.

NORMAN HALL.

R. GRAHAM MORRISON, being duly sworn according to law, deposes and says, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

386 A. My name is Richard G. Morrison; am thirty-one years old; reside in Sharon, Pa.; am a bookkeeper.

Q. In whose employment?

A. Wm. McGilvray and Co. and Vinton Iron Co.

Q. Do you keep the books of the Vinton Iron Co.?

A. I do.

Q. Please state the several places or furnaces of which the Vinton Iron Company have received slag or furnace-runners, or other refuse material, for the purpose of making iron therefrom, giving the quantity from each place or furnace, as taken from the books.

A. From the Clay Furnace, Mercer County, Pa., thirty-five tons; from the Sharpsville Furnace, in the county aforesaid, fifteen hundred and ninety-three tons; from furnace of Boyce, Rall and Co., known as Sharon Furnace, four hundred and eighty-six tons; from the Middlesex Furnaces, two hundred and sixty-seven tons; from Etna Furnace, in New Castle, Pa., fifty-one tons; from Wampum Furnace, Wampum, Pa., four hundred and sixty tons; from the Superior Furnace, Pittsburgh, one hundred and twenty-four tons; from Richards Furnace, Warren, Ohio, fifty tons; from Cleveland and Newburgh, one hundred and eleven tons. In all, forty-three hundred and eighty-seven tons.

Q. Besides the quantity you have received, has the company existing leases for collecting this material from other furnace dumps?

A. I think they have.

387 Q. Are you still receiving this material from different places?

A. We are, by car-loads.

Q. Do you superintend the weighing of this material as it comes in?

A. I do.

Q. What is its appearance as to being old or freshly made?

A. Some of it is old and some of it is new.

Q. What is the condition of that which you received from Cleveland?

A. New; quite freshly made.

R. G. MORRISON.

JOHN J. VINTON, being duly sworn according to law, doth depose and say, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is John J. Vinton; residence, Sharon; aged fifty-three years, and by occupation am an iron-founder.

Q. Are you one of the plaintiffs in this suit and the inventor of the method of manufacturing iron from blast-furnace slag, patented October 17th, 1873?

A. Yes, sir.

Q. What is your experience in the manufacture of iron from blast-furnace slag by the process described in the patent?

A. I have made pig-iron by this process of melting slag in a cupola furnace by charging my cupola with coke and slag, in order to
388 produce pig-iron; have made large quantities.

Q. In the patent it is stated that you first place a bed of coke in the cupola; how much coke do you use to form the bed?

A. I use now, when I am running, twenty bushels of coke to form the bed in the cupola.

Q. In the patent you say that after the furnace is in operation you charge it with about three bushels of coke, fifty pounds of iron oxide, eight hundred pounds of slag, and a fourth of a bushel of limestone, and you also state that these proportions may be slightly varied as the occasion requires. In your practical operations what variations have you found it necessary or convenient to make?

A. In the first place, I let the fire come through the bed of coke which I have stated. I found it in my experience that I could vary the quantities of material used to make iron from this slag by charging upon my bed of coke from sixteen to eighteen hundred of slag to about five bushels of coke. After my bed is put on, I continue in that way until I am through with my day's work. In place of using the scrap-iron, I have found that there is oxide enough in the slag to do the work. I make on an average about ten tons of pig-iron a day. I use about a half a bushel of lime to a charge.

Q. Then you make the charges larger, though in about the same relative proportions, as described in the patent?

A. Yes, sir.

389 Q. Is there any difference in the size of the cupola in which you are now working and that in which you tried your experiments?

A. Yes, sir; my cupola is now larger than the one in which I made my experiments.

Q. In the patent you say that provision is made for the passage of the slag from the furnace at a point below the tweer; what do you refer to?

A. To my cinder-notch. There is a passage to run off the cinder. I have it in my present cupola about three inches below the tweers.

Q. Is this cinder-notch common to foundry cupolas, or is it a special feature of the slag cupola?

A. No, sir; it is not common in foundry cupolas, for the reason that there is not so much cinder in pig-iron as there is in slag; for that reason I put this cinder-notch in my cupola.

Q. Is it a necessary feature of the slag cupola?

A. Yes, sir.

Q. What percentage of iron, in your experience, do you recover from the slag in your process?

A. On an average it yields about fifty-five per cent.; but there is some slag that will yield from sixty to seventy-five per cent.

Q. Do you know John Enwright, of Sharon, Pa.?

A. I do.

Q. When did you first become acquainted with him? State the particulars.

A. I think in the summer of 1872; I first saw the man one afternoon; I was sitting on my porch in front of my house, and not feeling very well at that time; Mr. Runser came by in his buggy
390 and stopped in front of my house and asked me to take a ride out with him in the country. I told him I did not feel very well. He told me that it would do me good to go out into the country, so I went along. As we went up the road we came to this shanty of John Enwright's. There was something in the shape of a cupola standing on a stone or brick foundation away from this shanty about eight or ten feet. Mr. Runser made a remark that there was something going on there, and said to me, "Vinton, let's us go and see what it is." We got out of the buggy and went over the fence. There was a man standing there and that man was this John Enwright. Mr. Runser asked him what he was going to do there. He said that he was going to make nails, and images to put on the walls, and other light castings, or some such remark. It struck me at once that that man was a Catholic, when he spoke of making images to put on the walls. Either Mr. Runser or I told him that the water coming down the run would wash the end of his shop away. He said he would fix that; that he was going to build a wall with that material over there, pointing to some kind of material in a pile. Mr. Runser said to me "Mr. Vinton, let's go;" and off we started, across the fence, the same way we went it.

Q. Did you examine that pile to see what the material was?

A. No, sir; I never examined it; did not go near it.

391 Q. Have you been to that place since the summer of 1872?

A. No, sir.

Q. Have you seen Enwright since that time; if so, when and where?

A. Yes, sir; have seen him since that time.

Q. Have you had any conversation with him since you were at his shanty?

A. Yes, sir; he came over to the foundry some time after I got out my patent, and said to me that he understood that I had a patent for melting this slag. I answered him, yes, sir, I had. He said to me in this way: "Are you aware that I have a claim on this?" I said, "No sir." I asked him if he had a patent on it; he said "No."

JOHN J. VINTON.

Now, August 24th, 1875, adjourned to me't August 25th, 1875, at 9 a. m.

Now, August 25th, 1875, met in pursuance to adjournment.

WILLIAM BRANNON, being duly sworn according to law, doth depose and say, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is William Brannon; my age is thirty years; reside in Sharon, Pa., and by occupation am a boiler-maker.

Q. Do you know Mr. John Enwright, of this town?

A. I know him by sight; never spoke to him that I know of.

392 Q. Did you ever notice an erection somewhat resembling a

cupola, about half a mile or so up the Shenango River, on the Orangeville road, which is said to have been built by John Enwright?

A. Yes, sir; I have seen it.

Q. Please describe it and the other buildings and fixtures connected therewith.

A. The cupola is about six feet high, from 36 to 40 inches in diameter, and about six or eight feet from the building. The building is about sixteen by twenty feet, and about eight feet high; it is located very near a run or stream of water; the upper corner stands a little over the run, or on a line with the bank; the lower corner is two or three feet from said run.

Q. How is the building protected from the run, or what kind of a foundation is it built on?

A. It is built from old fire-brick from blast-furnaces and this slag or furnace-runners.

Q. When did you see this place?

A. Think it was in September, 1874; have since passed it when on the road, but have not examined since September, 1874.

Q. When you saw it in September, 1874, or at any time subsequent to that date, was it in operation for foundry purposes?

A. No, sir; it was not.

Q. Did it appear to have ever been in operation?

A. No, sir.

W. F. BRANNON.

393 A. B. LLEWYLEN, being duly sworn, doth depose and say, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

A. My name is A. B. Llewlyn; reside in Sharon, Pa.; am twenty-five years old, and am by occupation a furnaceman.

Q. How long have you been connected with the iron business? Please name the blast-furnaces with which you have been connected.

A. I have been connected with the furnaces of Westerman Iron Company's for some ten years; have had charge of them for about seven years.

Q. Have you had experience as to construction and operation of foundry cupolas?

A. No, sir.

Q. Do you know the material now called furnace-runners, or mixture of slag and iron left in the runners of blast-furnaces after casting?

A. Yes.

Q. Prior to October, 1873, did you ever see or hear of such material being used in a foundry cupola for the purpose of making iron from them?

A. Have heard of it, but have never seen it; am not positive as to date.

Q. Prior to that time did you ever know of this material being dug up from the cinder dumps of blast-furnaces and collected for the purposes of making iron therefrom?

A. No; prior to that time we had piled up a little of this material, freshly made, for the purpose of trying it in the blast-furnace, but did not use it.

394 Q. Subsequently to that date did you use it in the blast-furnace?

A. Yes, sir.

Q. What is the usual charge of a blast-furnace when coke is used?

A. I never used coke by itself; do not know exactly.

Q. What quantity of coal do you use?

A. I use about five hundred and seventy-five pounds of coal to four hundred and fifty of ore—to four hundred and seventy-five of ore; this varies.

Q. How much fuel, coal, or coke and coal mixed does it take to make a ton of iron?

A. As a general thing from two and a half to three tons; sometimes more and sometimes less.

Q. Suppose you were to put in a charge of slag material instead of ore, what difference, if any, in the quantity of fuel would be required to melt it?

A. I cannot say, but think that it would take less fuel to melt the slag than the ore.

Q. How much less fuel do you suppose it would take to get the iron out of the slag than out of the ore in a blast-furnace?

A. I cannot tell, but think it would be about fifty pounds less to a charge.

Q. Do you think that you could get a ton of iron from this slag in a blast-furnace by using from two and a half to three tons of fuel?

A. I don't think that it would do to put it in a blast-furnace by itself, as it would conglomerate—melt too soon; it will do with ore. I
395 think would not take more than 2½ tons of fuel, if it came down all right, which I don't think it would, to make a ton of iron.

Q. Suppose that by putting this material, furnace-runners, through a foundry cupola you could recover a ton of iron by the use of seven hundred pounds of coke, in your opinion would the use of a cupola be more economical than a blast-furnace for the purpose of recovering the iron from this slag?

A. Yes.

Q. How long does it take for a charge to come through a blast-furnace?

A. From eighteen to twenty-four hours; sometimes more, sometimes less. Twenty-four is about the average.

Q. Suppose that by the use of a cupola furnace you could put through and cast ten tons of pig-iron from this slag material in the course of from five to six hours, would you consider it a quicker and more profitable method of extracting the iron from this slag than putting it through the blast-furnace?

A. Yes, sir.

Q. Do you know Homer Hamilton, one of the defendants in this suit?

A. Yes, sir.

Q. In defendants' answer to the bill of complaint in this case Homer Hamilton makes oath that upon his personal knowledge, and upon information and belief, that you have used material called furnace-
396 runners, or runners from blast-furnaces or smelting-furnaces, in exactly the same way and manner, and by exactly the same method and process, in which said runners now are and have been used by defendants, Homer Hamilton & Co; and in the testimony of Homer Hamilton in this case he says he uses this material in foundry cupola; is this statement, as to your knowledge of the use of this material, correct?

A. No, sir; I never used it in a foundry cupola furnace; never used it in any way until after the patent.

Q. Do you know John Enwright, of this town?

A. Yes, sir.

Q. Did you ever have any conversation with him about this slag business? If yes, state when, where, and how it occurred, and what was said.

A. He told me that he had this thing patented in England before he came to this country. At another time he told me that he never thought of it until he was here in this country. This conversation was after Vinton had obtained his patent.

(Objected to.)

Q. Who was the first to utilize this slag, so far as you know, in a foundry cupola?

A. Mr. Vinton, of Sharon, Pa.

Cross-examined Mr. HARRIS, for defendants:

Q. Did you ever know, prior to October, 1873, of furnace-run-
397 ners put back into the furnace and melted with the ore?

(Question objected to for the reason that the witness has already said that he did not so use them. Question withdrawn.)

Q. Did you ever know, prior to October, 1873, of furnace-runners being put back into the furnace and melted with ore by any parties?

A. I do not remember as to dates; we used it as quick as we heard that Mr. Vinton was using it in his cupola; it was a short time afterwards.

Q. How long have you known that furnace-runners contained iron?

(Objected to as not in cross-examination.)

A. I was always taught, from the first time I went into a furnace, that there was iron in the cinder, but never thought that there was enough to warrant in running it over again.

Q. At the time you piled up those runners did you know that they contained iron enough to pay for melting them?

(Objected to because it is not cross-examination.)

A. We thought there were iron in them; for this reason we piled them up.

A. B. LLEWELLYN.

JOHN U. BUDD, being sworn according to law, doth depose and say, in answer to the following interrogatories:

Q. What is your name, age, residence, and occupation?

398 A. John U. Budd; am twenty-three years old; reside in Sharon, Pa.; am a millman.

Q. Do you know John Enwright, of this town?

A. No, sir.

Q. Did you ever see an establishment or improvement about a half mile north of Sharon, on the Orangeville road, resembling somewhat a cupola furnace, said to have been erected by said Enwright?

A. Yes, sir.

Q. Describe what sort of a place it is.

A. It is a small frame or plank building, fourteen or sixteen feet by twenty or twenty-six feet; on north side of the building is a cupola about six feet high, from thirty to thirty-six inches in diameter; saw slag or runners under the foundation of the building; also in the embankment to protect the building.

Q. Have you seen this place more than once?

A. Yes, sir.

Q. Have you ever seen any foundry-work going on there?

A. No, sir.

Q. When did you first see the place?

A. Saw it shortly after it was built, in 1873 or 1874; can't be sure of dates.

JOHN U. BUDD.

JOHN J. VINTON recalled:

Q. In your testimony yesterday, were you asked anything as to the time it took to complete the heat from the blowing in of the cupola to the casting; if not, please state what your experience is in this respect?

399 A. No; that question was not asked me; it takes me from five to six hours to run out about ten ton' of pig-iron.

Cross-examined by Mr. HARRIS, for defendants:

Question. State what difference there is in principle between melting furnace-runners in a blast-furnace and in a foundry cupola.

(Question objected to as not in cross-examination.)

A. I cannot tell, from the fact that I have never melted any in a blast-furnace.

Q. All that is necessary in either case is the application of sufficient heat, with a sufficient quantity of fluxing material, is it not?

(Question objected to for the reason that the witness has just said that he has never had any experience with a blast-furnace.)

A. It requires intense heat in either case; I know it is so in my cupola, and suppose it is so in the blast-furnace; and I'll say that there is more flux in some slag than in other; so it does not require so much lime.

Q. Does it make any difference whether the furnace or cupola in which these runners are to be melted is in the shape internally of the common blast-furnace or the ordinary cupola?

(Question objected to for the reason that he has had no experience with a blast-furnace.)

A. I cannot tell; my opinion is that the cupola is the quickest; and I think the shape of the cupola is the best, as the blast-furnace is built with boshes which would prevent it from coming down fast enough.

400 Q. Do you claim that you invented the application of heat to the melting of furnace-runners?

(Question objected to for the reason that the patent upon which this suit was brought shows what is claimed as the invention in dispute.)

A. No, sir; I do claim that I melted slag or runners first by a foundry cupola.

Q. Do you claim that you made the first discovery that furnace-runners contained metal'ic iron?

(Question objected to for the reason that the patent upon which this suit was brought shows what is claimed as the invention in dispute, and the witness has just stated what he does claim to have invented, to wit, the process of melting slag or runners in a foundry cupola.)

A. No, sir; it may be that others have discovered that there was metal'ic iron in it before I did.

Q. Do you claim that you made the first discovery that furnace-runners could be melted in any kind of a stack, either like a furnace or cupola, by the simple application of sufficient heat, with some fluxing material?

(Same objection as last made.)

A. I will say, in answer to that, that I never knew of it having been melted in any kind of a stack until I melted it in the cupola of Wm. McGilvray and Co.

Q. Do you claim the discovery of the foundry cupola?

(Same objection as above.)

A. No, sir.

401 Q. Do you claim the discovery of coke as fuel for melting iron?

(Same objection, and for the further reason that the preceeding questions are immaterial.)

A. No, sir.

Q. Do you claim the discovery of the use of limestone as fluxing material?

(Same objection as last above stated.)

A. I do not for melting pig-iron; for reducing slag on runners into pig-iron, I do.

Q. Do you claim the discovery of melting iron in a foundry cupola?

(Same objection.)

A. No, sir.

Q. What difference, in principle or operation, is there in melting in a cupola a runner containing seventy-five per cent. of metal'ic iron and in melting in the same cupola a pig containing ninety-six per cent. of metal'ic iron?

(Question objected to.)

A. The difference there is, the pig-iron is more pure than slag or runners; that it requires more blast to melt the slag than pig-iron; the slag is in more of a raw state than pig-iron; the difference in the furnace is, one requires a notch to run off the cinder and the other does not.

Q. Is it not true that nearly every pig of iron contains, or has adhering to it, more or less slag or cinder?

A. There is a small portion of cinder in the pig-iron; say in melt-

402 ing ten tons of pig-iron it may throw off about a wheelbarrow full of cinder, and in melting ten ton' of pig-iron from slag I hauled off from the cupola from twelve to fifteen cart-loads of cinder.

Q. What must be the percentage of slag contained in the mass before it ceases to be pig-iron or scrap, and becomes a runner or slag or refuse of a blast-furnace?

A. I don't know.

Q. Please explain any difference there is in principle, process, or appearance in melting runners which contains fifty per cent. of metal'ic iron, and a quantity of runners or scrap or pig-iron containing ninety per cent. of metal'ic iron.

A. I would say that slag or runners, as it is termed, requires more blast than pig-iron or scrap to reduce to pig-iron; there is no other difference that I know of. I mean by more blast, more heat.

Redirect:

Q. What is the difference between slag and pig-iron?

A. Slag is a kind of raw material which has not been melted into pig-iron, and pig-iron is a marketable article.

Q. Prior to your discovery, was slag ever utilized for the purpose of making pig-iron, so far as you know?

A. No; not within my knowledge; if I should have known it, would never have taken my oath.

Q. Can you make castings by putting slag into a cupola fur-

403 nace the same as you can by putting pig-iron into a cupola, and treating them both in precisely the same manner, with a cupola constructed exactly the same way?

A. I can make castings from slag, but it is not fit for castings, for

the reason it makes the iron too hard; there is also a change to be made in the cupolas; in the one for making castings out of pig-iron I have no notch. When slag is used a notch is required.

Q. Can you use a cupola furnace for melting slag, in making iron therefrom or castings, without the cinder-notch?

A. No, sir.

Q. Can you melt pig-iron and make castings therefrom in a cupola without having the cinder-notch?

A. Yes sir.

Q. Then there is a difference in the process and in the result between melting pig-iron in a cupola furnace and making iron from slag in a cupola furnace?

A. Yes, sir.

Recross-examination, which is objected to by attorney for complainant:

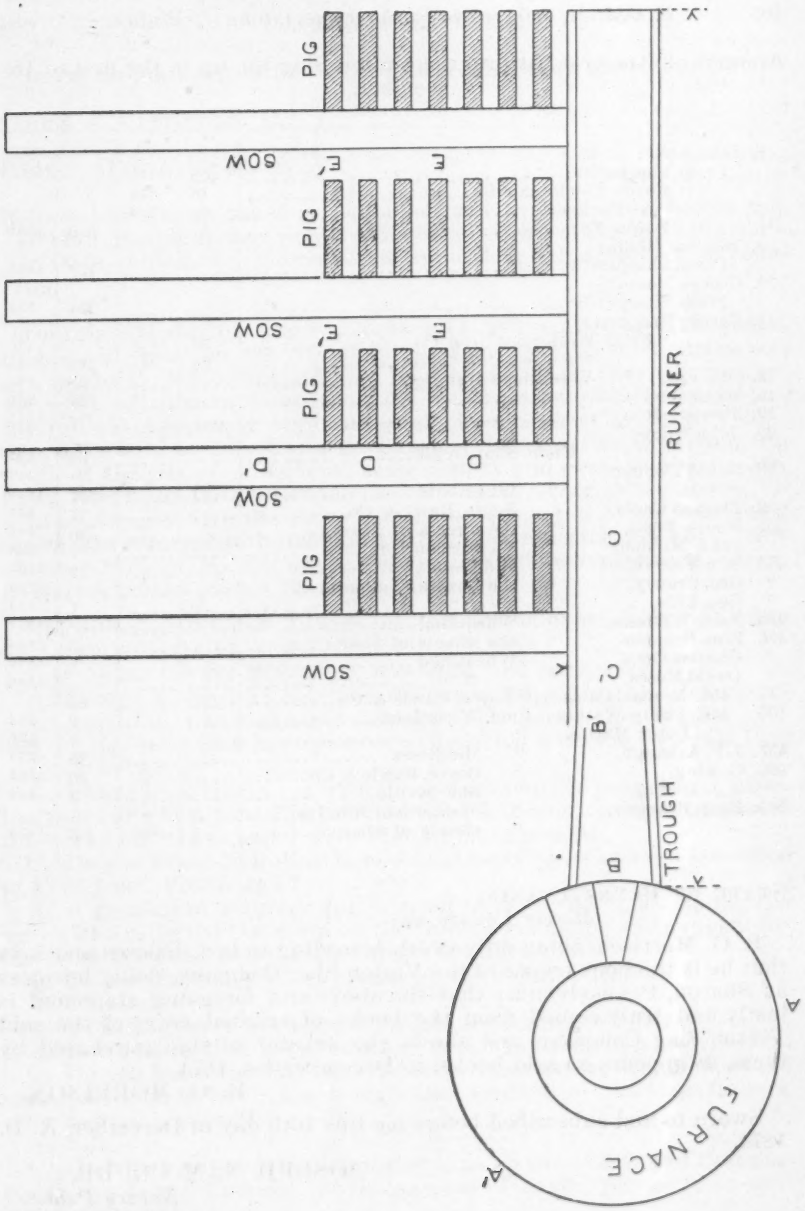
Q. Do you claim the invention of a cinder-notch as applied to a cupola furnace?

A. I have not made that as a claim, but never saw it done until I did it. I claim it as a part of my process.

JOHN J. VINTON.

404 This is Exhibit B referred to by the witnesses Banard Brannan and others.
December 17th, 1874.

JOSEPH N. McCLURE,
Notary Public.


PIG
SOW
PIG
SOW
PIG
SOW
PIG
SOW
RUNNER
TROUGH
FURNACE
A
A'
B
B'
C
C'
D
D'
E
E'
K
K'

405 *Exhibit M, referred to by the witness John J. Vinton.*

Amount of slag brought into the Vinton Slag Co. up to the first of December.

8. John Kobl:					
From Sharpsville	469	1090			
" Boyce, Rawle and Co	40	855			
" Clay Furnace	19	1423			
" Eatna Furnace	51		580	1100	
9. William Hoffins:					
From Sharpsville	.....	.....	157	1517	
10. George Moore:					
From Sharpsville	.....	.....	254	892	
11. Barney Brannon:					
From Westerman Iron Co	58	1120			
" the streets of Sharon	61	991	119	1581	
12. Geo. Fyr, " Westerman Iron Co	.....	.....	58		
16. Wampum Furnace Co	.....	.....	197	460	
19. Stewart Iron Co	.....	.....	219	2129	
20. John Riley:					
From Sharpsville	.....	.....	65	1191	
26. David Donnan:					
" Wheatland	.....	.....	297	1830	
32. Thomas Coats, " Boyce, Rawl & Co	.....	.....	17	847	
357. Henry Boyd, " the streets of Sharon	.....	.....	36	880	
" John Muldon, " Westerman Iron Co	.....	.....	7	694	
453. Wm. Edwards, " Middlesex	.....	.....	10	1853	
" Geo. Crowly, " the streets of Sharon	.....	.....		1712	
" Geo. Ellis, " " " " "	.....	.....	1	1754	
454. John Williams, " Wheatland	.....	.....		2050	
455. Wm. Brannon, " the streets of Sharon	.....	.....	3	1276	
" Charles Orris, " Wheatland	.....	.....	5	1852	
" David Moses, " "	.....	.....		1210	
456. Michael Cassady, " Boyce, Rawle & Co	.....	.....	22		
406 456. Philip Watkins, from Wheatland	.....	.....	2	964	
" Peter Mattay, " "	.....	.....	3	26	
457. J. P. Arbaugh, " Middlesex	.....	.....	26	821	
460. C. King, " Boyce, Rawle & Co	.....	.....	30	1155	
" J. J. Hoffins, " Sharpsville	.....	.....	3	106	
461. Font. Brannon, " Westerman Iron Co	1	1352			
" streets of Sharon	1	1392	3	1176	

STATE OF PENNSYLVANIA,
Mercer County, ss:

R. G. Morrison, being duly sworn according to law, deposes and says that he is the bookkeeper of the Vinton Slag Company, doing business at Sharon, Pennsylvania; that the above and foregoing statement is justly and truly copied from the books of original entry of the said Vinton Slag Company, and shows the amount of slag purchased by them, as appears on said books, to December 1st, 1874.

R. G. MORRISON.

Sworn to and subscribed before me this 16th day of December, A. D. 1874.

JOSEPH N. McCLURE,
Notary Public.

407 *Complainants' testimony.*

In the circuit court of the United States, northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON ET AL.

Rebuttal testimony taken in behalf of said complainants, before me, Walter Morris, notary public and commissioner of deeds for the State of Ohio, pursuant to notice hereto appended, and agreement of counsel.

On this 27th day of August, A. D. 1875, at the office of H. F. Grier, 167½ Wood street, in the city of Pittsburgh, Pennsylvania, parties appearing by A. McCallum, solicitor for complainants, Thos. W. Sanderson, esq., solicitor for defendants, not being present, taking of the testomony was adjourned until half past two o'clock p. m. of this same day, to be held at the office of the Superior Furnace, Preble avenue, 9th ward, of the city of Allegheny, same county and State as above; Mr. Fred. Harris, on the part of the defendants, agreeing to the above.

In conformity with the above mutual agreement, the case mentioned above was resumed at the office of the Superior Furnace, 9th ward, Allegh*a*ny. Present, A. McCallum, esq., solicitor for complainants; Fred. R. Harris, on the part of the defendants.

GEORGE J. NORISH, a witness for the complainants, who first being duly sworn according to law, deposeth and says:

1. Q. What is your name, age, residence, and occupation?

A. George J. Norish; age, 51; residence, 9th ward, Allegheny; occupation, watchman and clerk of the Superior Iron Works.

408 Q. How long have you been connected with the Superior Iron Works?

A. I have been connected with these works for the past eleven years, ten years of which time I have acted as bookkeeper; during that period the works have been under five different managements.

Q. Do you know N. B. Hatch, of Allegheny City, who has a law-office in Pen street, Pittsburgh?

A. A gentleman representing himself to me to be N. B. Hatch, the agent who collected the rents off the furnace company, and as agent for the Scherly estate, called on me about ten days since.

Q. Do you know any other person by the name of Hatch?

A. I do not.

Q. How long have you known the gentleman referred to?

A. Don't know that I ever saw him previous to the time referred to.

Q. Do you know the slag material called blast-furnace runners, or the material which is left in the trough and runners of the blast-furnace after casting pig-metal?

A. I do.

Q. Have you any practical knowledge as to the utilizing of that material in a foundry cupola for the purpose of making pig-metal or castings therefrom?

A. I have seen it made here at our foundry into pig-iron; never saw it made into castings.

Q. When did you commence here to use this slag referred to in the foundry cupola?

A. Middle or latter part of May, 1874.

409 Q. During the eleven years you have been connected with this furnace was that slag ever used in the foundry cupolas before May, 1874?

A. No, sir.

Q. Did you ever tell the gentleman who called upon you, and whom you believed to be Mr. Hatch, that this slag had been used in the foundry cupola at these works four years ago?

A. I never told him or any one else.

(Mr. Fred. Harris, on behalf of defendants, objects to the last question propounded the witness George J. Norrish.)

Cross-examination:

Q. (By Mr. HARRIS.) Have you any knowledge of the utilization of furnace-runners, or slag, in a blast-furnace or foundry cupola, prior to May 1st, 1874?

A. It is customary for blast-furnaces to use their own cinders or runners along with scrap in the blast-furnace, but I have no knowledge of it in the cupola.

Redirect:

Q. (By complainant.) How is the scrap-iron and runners used in the blast-furnace?

A. We use our own furnace scrap-iron in small charges and odd times, seldom more than three to five hundred pounds in a day, and sometimes none at all. When we attempted to use the furnace-runners, when making them in large quantities, it cut the lining of the furnace all to pieces, so we piled up some of them on one side, and many of them were thrown into the river.

410 Q. Is it not the fact that large quantities of this material has been dug up from the cinder dumps of this furnace along the river bank and sold within the last twelve months, and that large quantities are under water now?

A. It is. Mr. Greir got over 100 tons of it along the river bank, and was stopped from getting more on account of high water. Mr. Greir got about 130 tons of it.

GEO. J. NORRISH.

Counsel for complainant offers in evidence, to be read at the hearing of the cause, certified copy of letters patent No. 143600, granted to John J. Vinton, October 14th, 1873.

Also certified copy of letters patent granted to William McFarland for improvement in cupola furnaces, being the same referred to by him in his testimony in this case. Also copy of the record in the case of William McCreery et al. vs. Joshua Reymer et al., the same to be produced at the hearing of this case.

411 EXHIBIT.

The United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted John J. Vinton, dated October 14th, 1873, No. 143600, for "improvement in the manufacture of iron from blast-furnace slag."

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto annexed,

this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.]

J. M. THACHER,
Acting Commissioner.

412 No. 143600.

The United States of America to all to whom these presents shall come:

Whereas John J. Vinton, of Sharon, Pennsylvania, has presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in the manufacture of iron from blast-furnace slag, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and

Whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law: Now, therefore, these letters patent are to grant unto the said John J. Vinton, his heirs and assigns, for the term of seventeen years from the fourteenth day of October, one thousand eight hundred and seventy-three, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this fourteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-eighth.

B. R. COWEN,
Acting Sect. of the Interior.

Countersigned:
[SEAL.]

M. D. LEGGETT,
Commissioner of Patents.

413 UNITED STATES PATENT OFFICE.

John J. Vinton, of Sharon, Pennsylvania. Improvement in the manufacture of iron from blast-furnace slag. Specification forming part of letters patent No. 143600, dated October 14th, 1873. Application filed October 3, 1873.

To all whom it may concern:

Be it known that I, John J. Vinton, of Sharon, in the county of Mercer and State of Pennsylvania, have invented certain new and useful improvements in method for extracting iron from the slag or refuse of iron furnaces; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it pertains to make and use it, reference being had to the accompanying drawings which form part of this specification.

My invention relates to the production of cast-iron from the slag or refuse of the smelting or blast furnace.

Heretofore a large percentage of good metal'ic iron has been thrown away with the slag, and become lost to commerce, so far as its use as metal'ic iron is concerned. This is more particularly the case with rich ores, such as the Missouri and lake ores, which, from their nature, flux imperfectly in the ordinary smelting-furnace. When imperfectly fluxed

the slag assumes a thick consistency, and cools with a general
414 greyish color, and though the presence of metal in it cannot be detected by the eye, yet the slag will be found to be of comparatively great specific gravity, and, in fact, contains a very large percentage of good metallic iron, often as great as the amount of metal reduced from the ore in the process of smelting.

To reduce this metal from the heavy slag of the smelting-furnace, and thereby increase the production of iron from the same amount of ore, is the object of my invention. To accomplish the desired result I employ a cupola furnace; but furnaces specially adapted to the purpose may be constructed and conveniently used in connection with the blast-furnaces when the iron is smelted.

The heavy slag is first pulverized, or broken up into small pieces, or it may be made granulous or spongy by passing water or air through it when in a molten state, or in any of the well-known ways.

A bed of coke or other suitable material is first placed in the cupola, and on the top of the coke a small quantity of scrap or other oxidized iron (preferably scale or black oxide of iron) is sprinkled.

The slag to be operated on is then introduced, as evenly as possible, on the top of the coke and iron oxide, and on the top of the slag I sprinkle a small quantity of limestone broken up into small pieces, then a layer of coke, followed with scrap and scale, slag and lime, as before, alternately, until the whole cupola is charged.

The fuel is then ignited, and when the fire is above the tuyeres
415 the blast is turned on to the full. Owing to the presence of the iron oxides, the heat is very great when brought in contact with the slag, and the latter is speedily reduced, and as the operation goes on fresh charges of the materials are supplied from the top of the cupola, provision being made for the passage of the remaining slag from the furnace at a point below the tuyeres.

In this way it will be seen that the process is continuous, and the furnace is not permitted to get cool.

The charge is made up in about the following proportions, but may be slightly varied as occasion requires: After the furnace is in operation, first, three bushels of coke; second, fifty pounds iron oxide (scrap or scale); third, eight hundred pounds slag; fourth, one-fourth of a bushel of limestone, thrown into the cupola in succession, and from time to time as required.

When there is much sulphur in the iron a small quantity of the black oxide of manganese may be blown in through the tuyeres, and salt or litharge, or a mixture of any two or all three of these ingredients, may be used in this manner with good effect. The iron thus obtained is run into moulds in the usual way.

What I claim as my invention, and desire to secure by letters patent, is—

The herein-described method of reducing iron from the slag or refuse of blast or smelting furnaces, substantially as set forth.

416 In testimony that I claim the foregoing I have hereunto set my hand this 1st day of October, 1873.

JOHN J. VINTON.

Witnesses:
A. McCALLUM,
J. HANWAY.

Filed Nov. 2nd, 1874.

EXHIBIT.

The United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office.

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-ninth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

J. M. THACHER,
Acting Commissioner.

417 [W 17, 192.]

Know all men by these presents that I, John J. Vinton, of Sharon, county of Mercer, State of Pennsylvania, owner of patent right for extracting iron from the slag or refuse of iron furnaces, granted to me by the United States Government for the term of seventeen years from the 14th day of October, 1873, and is numbered 143600.

Now, be it known that I, the said John J. Vinton, for and in consideration of one hundred dollars to me paid by John Fisher, William McGilvray, and Thomas E. Blunt, of Sharon, in the county of Mercer and State of Pennsylvania, the receipt whereof I do hereby acknowledge, have sold, assigned, and conveyed, and by these presents do sell, assign, and convey, to the said John Fisher, William McGilvray, and Thomas E. Blunt, their heirs and assigns, the three-fourth interest, right, and title in and to said patent right, or to make, use, and vend to others to make and use said improvement for extracting iron from the slag or refuse of iron furnaces, within and for the United States and Territories, and all parts thereof, and not elsewhere, for the full term of seventeen years from the date of said patent right.

In witness whereof I have hereunto set my hand and seal this 22nd day or January, A. D. 1874.

JOHN J. VINTON. [SEAL.]

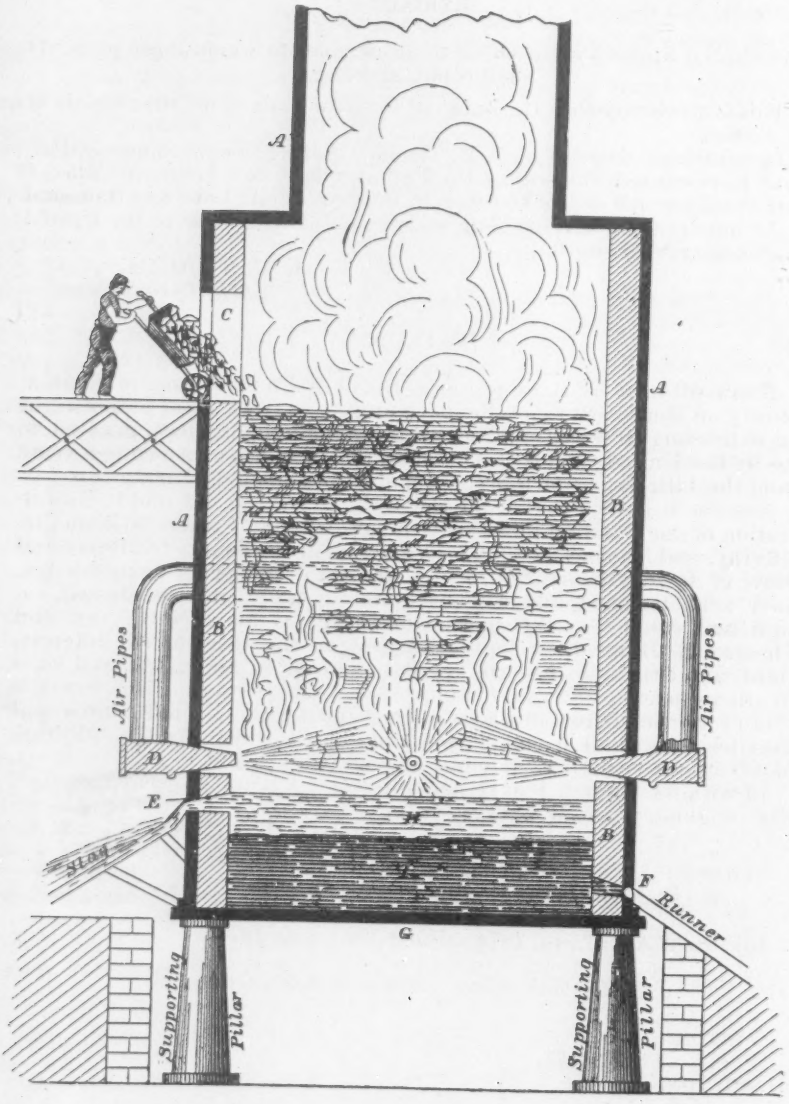
Witness:
R. E. MORRISON.

Recorded April 28th, 1874. Filed Nov. 2nd, 1874.

418 *Vinton's cupola furnace or slag furnace.*

VINTON
v.
HAMILTON. } No. 171.

A, outer shell, made of boiler-iron.
B, fire-clay lining.
C, charging-door.
D, tuyeres.
E, cinder-notch.
F, tapping-hole.
G, removable bottom.
H, slag.
I, moulten iron.
J, runner.



419 EXHIBIT.

The United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted William McFarland, dated December 7th, 1858, No. 22257, "for improvement in furnaces for melting iron."

In witness whereof I, Ellis Spear, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this thirtieth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] ELLIS SPEAR,
Acting Commissioner.

The United States of America to all to whom these letters patent shall come:

Whereas William McFarland, of St. Louis, Missouri, has alleged that he has invented a new and useful improvement in furnace for melting iron, which he states has not been known or used before his application; has made oath that he is a citizen of the United States, that he does verily believe that he is the original and first inventor
420 or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose:

These are, therefore, to grant, according to law, to the said William McFarland, his heirs, administrators, or assigns, for the term of fourteen years from the seventh day of December, one thousand eight hundred and fifty-eight, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said improvement, a description whereof is given, in the words of the said William McFarland, in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office to be hereunto affixed.

Given under my hand, at the city of Washington, this seventh day of December, in the year of our Lord one thousand eight hundred and fifty-eight, and the Independence of the United States of America the eighty-third.

JACOB THOMPSON,
Secretary of the Interior.

[SEAL.] J. HOLT,
Commissioner of Patents.

421 The schedule referred to in these letters patent, and making part of the same.

To all to whom it may concern:

Be it known that I, William McFarland, of St. Louis, in the county of St. Louis and State of Missouri, have invented a new and useful improvement in cupola furnaces, and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings forming a part of this specification, in which—

A perspective view of my improvement is shown. The object of my invention is to prevent the collecting of the metal in the bottom of the furnace, and thereby keep the furnace free and in good melting order.

The nature of my invention consists in attaching a reservoir to the

furnace, to extend below the level of the bottom, for the purpose of receiving the metal as fast as it is melted.

To carry out my invention, I construct a reservoir, A, of the same material as the furnace B, and attach it to the side of the furnace by means of a pipe, which is located in such a position that the bottom of the furnace shall be nearly on a level with the top of the reservoir. The interior of reservoir and conducting-pipe *a*, I line with fire-brick the same as the furnace, and the top, *c*, of the reservoirs I make of cast-iron, and coat the lower side with clay so as to form a clay joint,
422 and fasten the top securely down. The bottom of the reservoir I make to drop in the same manner as the furnace bottom. The advantages resulting from my improvement are these: A saving in fuel, a saving in iron, a saving in time, and a saving in labor.

In the common cupola furnace the melted metal and slag are collected in the interstices between the coal below the tweers, and for the purpose of making room enough to hold the metal required the tweers are placed from ten to twenty-four inches above the bottom, according to the kind of work made.

With my reservoir attached, six inches is all the space required below the tweers, thereby saving from four to eighteen inches of fuel in the bed.

In the common cupola furnace, as the melted metal accumulates and rises, the slag being the lightest floats on the surface, and is carried upward amongst the coal; as it approaches the tweers, the direct action of the blast on it chills some, and turns it back, thus forming a nucleus for more to accumulate as it ascends or descends. This again forms an obstruction to the melted metal as it drops down, some of which is chilled by coming in contact with the cold slag. The chilled iron and slag thus keeps accumulating all through the heat, and it frequently happens that a furnace which will hold twelve hundred pounds of melted iron at the beginning will not hold two hundred pounds at the end
423 of a heat, an' that having lost its fluidity to such a degree (by coming in contact with so much dead matter in the bottom of the furnace) as not to be fit for casting. With my reservoir attached that difficulty is obviated, as the melted iron and slag flows into the reservoir immediately on reaching the bottom of the furnace, thereby keeping the furnace cleaner and in better melting order.

In the common furnace, owing to the accumulation of chilled iron and slag, the blast is obstructed so it cannot pass through the fuel freely, thereby impairing its melting properties and rendering the metal less fluid.

With my reservoir attached, the iron and slag having free egress from the furnace, less obstruction is offered to the blast; it circulates through the fuel better, effecting a more perfect combustion, and, with less fuel, melts quicker, and the melted metal is of a more uniform temperature throughout.

In the common furnace the accumulation of chilled iron around its sides renders it difficult to be cleaned out, and the fire-brick lining is often broken during the process.

With my reservoir attached no iron is chilled against the sides; consequently, it can be cleaned out quicker and without injury to the lining.

The stock remaining in the common furnace after a heat, consisting of iron, coal, and slag, is dropped, and after the largest pieces of
424 coal and iron are picked out, the balance is put in a mill and ground, to separate the small particles of iron from the slag and

fine coal with which it is mixed. By this process from two hundred to five hundred pounds of iron are saved, according to the size of the furnace and quantity melted.

With my reservoir attached there is much less stock left after a heat, owing to the tweers being lower and the slag escaping freely from the furnace. Owing to the ready escape of the metal also, very little is left remaining in the stock after a heat, the amount after grinding being about eighty per cent. less than when the reservoir is not used.

One reservoir may be attached to several furnaces at the same time, thereby collecting enough metal for the heaviest castings without handling it. Thus obviating in a great measure the labor and danger consequent on handling large bodies of melted metal by means of cranes.

In the common furnace the obstruction offered to the blast by the accumulation of chilled iron and slag toward the last of a heat renders it necessary sometimes to substitute blowing-cylinders (at considerable expense) for the fan-blower.

By the use of my reservoir less obstruction is offered by the blast, the fan-blower can be used to more advantage, and the necessity of substituting blowing-cylinders avoided.

I am aware that J. G. Martien obtained a patent in 1857 on a cupola furnace; also that Richard Savary obtained a patent in 1856 on
425 a cupola furnace; but neither of those arrangements embrace my "invention;" but if they did, they, as well as all similar furnaces, would be greatly improved in their operation. The patent of Martien is for an improvement in the manufacture of steel and wrought-iron from cast-iron by the application of atmospheric air, etc. By his plan any of the common furnaces may be used, the iron being collected in the usual manner in the bottom of the furnace, and after a sufficient quantity is thus collected then it is tapped from the furnace and conveyed by means of a trough or conductor to the receptacle or purifying furnace, to be operated on in a particular manner.

The patent of Richard Savary is for an improvement in the manufacture of wrought-iron by using a cupola furnace in connection with a group of puddling furnaces. He also collects the melted metal in the usual manner in the bottom of the furnace, and then, after having collected a sufficient quantity, he taps it from the furnace and conducts by a trough or conduit to his puddling furnaces, to be changed into wrought-iron. These furnaces do just what my improvement is calculated to obviate; I collect nothing in the bottom of my furnace, but collect the iron and slag in the reservoir as fast as it is melted, thereby keeping my furnace free and in good working order. There has always been more or less difficulty experienced by iron-founders in the management of cupola furnaces, caused by collecting the iron and slag in the
426 bottom of the furnace amongst the fuel, because as the iron rises in the furnace the slag is carried upward through the body of the coal, denominated the bed. When the iron is tapped from the furnace, the slag being less fluid and of a sticky nature does not settle with the iron, but adheres more or less to the coal, coating it and injuring the bed. Each time it rises more accumulates, and the action of the blast on the slag chills it, thereby forming a large body of dead matter in the furnace, curtailing its capacity and interfering with the melting.

What I claim as my invention, and desire to secure by letters patent, is—

The combination of a reservoir, A, with a cupola furnace, B, so as to

collect the metal as fast as melted, substantially as and for the purposes set forth.

WILLIAM McFARLAND.

Witnesses:
JNO. P. BETTON,
WM. STOOPS.

Ex'd: C. C. W.

(Here follows diagram marked page 426.)

427 In the circuit court of the United States for the northern district of Ohio.

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON ET AL. } Equity.

The complainants, by their solicitor, pray an appeal to the Supreme Court of the United States from the decree of this court dismissing their bill of complaint.

A. McCALLUM,
Solicitor for Complainant.

(Indorsed:) U. S. circuit court, northern dist. of Ohio. John J. Vinton et al. vs. Homer Hamilton et al. Appeal to Supreme Court of the U. S. A. McCallum, Washington, D. C., sol. for compl't. Filed Nov. 29, 1878. A. J. Ricks, clerk.

428 And afterwards, to wit, at the January term, A. D. 1879, of said court, to wit, on the 3rd day of February, A. D. 1879, the following order was made:

JOHN J. VINTON ET AL.
vs.
HOMER HAMILTON ET AL. } In chancery. No. 2597.

In this cause the complainants having prayed an appeal to the next term of the Supreme Court of the United States from the final decree rendered in this cause at the April term, 1878, of this court, and having filed their appeal bond, with sureties, to the satisfaction of the court, and having issued a citation as provided by law to the defendants, their said appeal is hereby allowed.

429 The United States of America, greeting, to Homer Hamilton, Frederick Gerring, John Stambaugh, and William Todd:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2d Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States within and for the northern district of Ohio, and allowed by said court, of the January term, A. D. 1879, of said court, wherein John J. Vinton, John Fisher, Thomas E. Blunt, and Wm. McGiloray are complainants, and you are defendants, to show cause, if any there be, why the final decree rendered against said complainants at the April term, A. D. 1878, of said court, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my official signature as one of the judges of said circuit court, this 4th day of February, A. D. 1879.

M. WALKER,
District Judge.

NORTHERN DISTRICT OF OHIO:

On the 8th day of February, A. D. 1879, I delivered a duly certified copy of this notice to Thomas W. Sanderson, att'y for the above defendants, at Youngstown, Mahoning County, Ohio.

N. B. PRENTICE,
U. S. Marshal,
By C. A. PRENTICE,
Deputy.

Service, $2.00; copy, .50; actual expenses, in lieu of mileage, 6.50—$9.00.

430 Know all men by these presents that we, Thos. E. Blunt, D. R. Shiras, C. W. Ray, and L. Buholz, as principal, and James Westerman, as surety, are held and firmly bound unto Homer Hamilton, Frederick Gerring, John Stambaugh, and William Tod in the sum of five hundred dollars, to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 20th day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-bounden Thos. E. Blunt, D. R. Shiras, C. W. Ray, and L. Buholz have appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the 12th day of September, A. D. 1878, in a cause wherein the said John Fisher, John J. Vinton, Thomas E. Blunt, and D. R. Shiras, Calvin W. Ray, and Louis Buckholz, adm'rs of William McGiloray, were complainants, and the said Homer Hamilton, Frederick Gerring, John Stambaugh, and William Tod are respondent:

Now, therefore, the condition of this obligation is such that if the above-named appellants, John J. Vinton et al., shall prosecute their appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against them as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

THOMAS E. BLUNT. [SEAL.]
D. R. SHIRAS. [SEAL.]
C. W. RAY. [SEAL.]
L. BUCHHOLZ. [SEAL.]
JAMES WESTERMAN.

Sealed and delivered in presence of—
JAMES H. ELLIOTT,
J. CAERSSBALL.

(Indorsed:) No. 2597. In the circuit court of the United States for the northern district of Ohio. vs. . Appeal bond. Approved and filed , 187 . , judge.

431 UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true,

correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein John J. Vinton, John Fisher, William McGilvory, and Thomas E. Blunt are the complainants, and Homer Hamilton, Frederick Gerring, John Stambaugh, and William Tod, doing business as Homer Hamilton and Company, are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, this 15th day of February, A. D. 1879, and in the 103rd year of the Independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

(Indorsement on cover:) No. 171. John J. Vinton et al., appellants, vs. Homer Hamilton et al. N. Ohio C. C. U. S. Filed 31st March, 1879.

SUPREME COURT U.S.
FILED
DEC 1 1881
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

No. 171.

JOHN J. VINTON ET AL.,

Appellants,

vs.

HOMER HAMILTON ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

ANDREW McCALLUM,
Counsel for Appellants.

Supreme Court of the United States.

JOHN J. VINTON, ET AL.,
Appellants,
vs.
HOMER HAMILTON ET AL.,
Appellees.

No. 171.
Oct. Term, 1881.

Statement of the Case.

The bill of complaint in this case was filed in the clerk's office, United States Circuit Court, for the Northern District of Ohio, July 17, 1874 (Record, p. 3).

Complainants allege that the defendants infringe certain Letters Patent for improvement in the manufacture of iron from furnace slag, granted to John J. Vinton, October 14, 1873, and pray for injunction and account of profits and damages (pp. 1–3).

Defendants filed their answer October 10, 1874, denying that said Vinton was the original and first inventor or discoverer of the improvement in the manufacture of iron from furnace slag, or from the slag of blast or smelting furnaces, set forth in the patent, and also denying that they have infringed said patent (pp. 4–9).

Replication was filed October 31, 1874 (p. 10).

Complainants' testimony-in-chief (pp. 13–23) was taken December, 1874.

Defendants' testimony (pp. 24 to 152) was taken March and April, 1875 (pp. 153–157), August 19, 1875.

Complainants' rebuttal testimony (157–182), was taken August, 1875.

Defendants' amended their answer November 3, 1875 (p. 12).

The cause was argued by counsel, April Term, 1878, and afterwards September 12, 1878; decree was rendered dismissing bill of complaint (p. 13).

Thereupon complainants appealed to this court.

The Subject Matter.

The Letters Patent on which the bill of complaint is based (pp. 183-4), is for an improvement in the manufacture of iron from blast furnace slag.

The specification recites the fact that, "*heretofore a large percentage of good metallic iron has been thrown away with the slag and become lost to commerce, so far as its use as metallic iron is concerned.*"

The object of the invention as stated, is "*to reduce this metal from the heavy slag of the smelting furnace, and thereby increase the production of iron from the same amount of ore, is the object of my invention.*".

The specification then sets forth the method employed for accomplishing the desired result, the essentials of which may be briefly stated as follows:

1. In the employment of a cupola furnace.

2. Pulverizing or breaking the slag into small pieces.

3. Charging the cupola first with a bed of coke, then a small quantity of scrap or oxidized iron, then the slag to be operated on, and on top of that a small quantity of limestone. Then another charge of coke, oxidized iron, slag and lime, and so on until the cupola is filled.

4. The fuel is then ignited and when the fire is above the

tuyeres the blast is turned on to the full, the slag is speedily reduced, and "*as the operation goes on fresh charges of the materials are supplied from the top of the cupola, provision being made for the passage of the remaining slag from the furnace at a point below the tuyeres.*" The process being thus continuous.

Specific directions are given for making up the charge which is, however, *to be varied in proportion as occasion requires.*

There is also a suggestion as to the use of certain other materials should there be much sulphur in the iron, but evidently not forming a material part of the method claimed, the claim being "the hereindescribed method of reducing iron from the slag or refuse of blast or smelting furnaces substantially as set forth."

The patentee, therefore, claims that he was the first inventor to discover a method of obtaining or recovering iron from certain waste material known as heavy blast or smelting furnace slag, and thereby increase the production of iron from the same amount of ore, and having made his discovery known to the public in the manner required by law, he claims that he is entitled to the protection which the Letters Patent granted him are designed to afford.

The Issue.

The defendants say that said Letters Patent are void for lack of novelty in the invention claimed, and they allege and claim to have proved:

1st. That the material—this heavy blast or smelting furnace slag—was known to contain iron in large quantities before the date of Vinton's alleged discovery.

2. That said material had before been used in blast furnaces along with ore, and that there was no difference in the method employed for reducing it in a blast or smelting furnace from that described in the patent.

3. That the common method of melting iron in an ordinary cupola furnace which has been in use for ages, is the same as

the method described in the patent for melting the slag and recovering the iron therefrom.

4. That the patentee, Vinton, was not the first to melt this heavy slag in a cupola furnace, and to recover the iron therefrom by the method described in the patent.

The questions to be determined are, therefore:

1. Did Vinton invent or discover anything patentable?

2. If he did, was he the first to make that invention or discovery known to the public in such manner as to entitle him to protection by Letters Patent under the law.

ASSIGNMENT OF ERRORS.

1. The court erred in deciding that the process described in the Letters Patent exhibited in complainants' bill was known and in common use before the complainant's application for said Letters Patent.

2. The court erred in deciding that said Letters Patent were and are now null and void.

Argument.

No opinion was filed, and, unless it be from the wording of the decree itself, we are not informed as to the grounds of the decision—what particular facts set forth in the record are relied upon to support the decree.

It may, therefore, be necessary to consider the whole record or at least so much of it as refers to the question of novelty.

It may not be necessary to consider the question of infringement, as the method employed by defendant appears to be the same as that employed by Vinton, the patentee.

I will discuss the question as briefly as possible under the two general heads before referred to:

1. Did the Patentee Vinton Invent or Discover Anything Patentable?

With regard to the Material Operated Upon.—The defendants allege that the heavy slag produced by smelting furnaces is an old and well known material. We do not deny that, but that is not the question here.

What we have to determine from the record, is whether it was treated as a waste material until Mr. Vinton discovered how to utilize it.

We insist that, prior to the publication of the patent, this heavy slag, which since the commencement of this suit is called "*runners*," was thrown away by the furnace men of this country as of no value.

The evidence shows that this material is found in the cinder piles, or dumps, or refuse heaps, of every furnace which has been visited and inspected by parties now engaged in this new business of recovering iron from the heavy slag; not in small quantities, but in vast quantities, aggregating many thousands of tons.

It is also shown that this material has heretofore been used for mending streets and roadways, for making roads and embankments, walls, railroad tracks, for protecting the banks of rivers, and for like purposes; and that it has been a source of great expense to furnace men, who had to get it out of their way—to get rid of it in any way.

It is also shown that this material, which heretofore proved such an expense to the furnace men, and which was therefore considered by them as worse than useless, is of great value to us—in fact, worth more, weight for weight, than the best quality of iron ore, not excepting the very best Lake Superior ore.

See Depositions of Bannard Brannon, pp. 13–14.
Allen C. Patton, pp. 15–16.
David Donnen, pp. 16–17.
George K. Moore, pp. 17–18.
John Kolb, p. 20.
Wm. K. Branner, p. 21.

In view of the testimony of these witnesses, can there be any question as to its having been treated as refuse material? If its value had been known, is it at all likely, is it

probable, that the furnace men would have made such a disposition of it as they did? Would the *Westerman Iron Company* have thrown it out as they did? Would it have been possible to have obtained such quantities of it in the streets of *Sharon, Sharpsville* and other places? Thousands of people have walked and rode over this material without suspecting its value. Railroads have been built upon it. River embankments have been made with it—made with a material which is worth as much, if not more, than the best Lake Superior ore. Thousands of tons of it have been thrown away as worthless. The owners of furnaces have *been paying men for hauling it away from their furnaces*, and the same men who hauled it away from the furnaces are now employed in digging it up and selling it to the patentee of this process for making it into pig-iron, and also selling it to the defendants, who infringe the patent. In face of such testimony as this, we are asked by the defendants to believe that this material has never been treated as refuse.

The testimony was taken only a few months after the date of the patent, and yet it is shown that some 7,000 tons of this material had been collected by two companies alone, complainants and defendants, and if any further testimony is required to show that it was the universal practice of furnace men to treat the material as refuse, it will be found in the deposition of Sebastian Runser (p. 167, Record), who examined the cinder dumps of nearly all, if not all, the blast furnaces in the States of Pennsylvania, Ohio and Indiana; also of the State of Missouri, along the Ohio river, and some furnaces in the States of New York, Kentucky and West Virginia, and found this material at all of them—large quantities of it.

One furnace alone he estimated produced 520 tons of this slag in one year.

Opposed to this testimony, what is there to support the allegation made by the defendants, to wit: that the value of this material was known long prior to Mr. Vinton's discovery.

The only evidence produced in support of defendants' theory, is that of a few furnace men who say they used this material by putting it back into the blast furnaces as made. Yet when we come to examine the record we find that this material has been obtained from the dumps of the furnaces where they say none was thrown away. For instance, the witness, *Wm.*

B. Pollock (defendants' testimony), was manager at *Wampun Furnace.* The record shows that this material was obtained from there (p. 170 Deposition of Morrison).

Again, this witness asserts that all the furnaces in the Mahoning valley used this material by putting it back into the blast furnace, and he enumerates the *Lowell,* Struthers, Hazelton, *Himrod's, Hubbard, Brown, Bonnell & Co., Eagle, Girard, Niles* and the *Mineral Ridge furnaces,* as the furnaces referred to. The record shows that large quantities of the material have been received by the defendants from most of these furnaces, to wit, from *Mineral Ridge, Himrod's, Niles, Girard, Hubbard, Lowell, Brown, Bonnell & Co.*

If all this material was utilized at these furnaces as made, how comes it to be in the possession of the defendants in such large quantities. The witness, *Wm Pollock,* was manager at Massilon and other furnaces. He said that he always used this material as made by putting it back into these blast furnaces. But he admits that if the iron was not visible in the form of shot in the slag it was thrown out on the dump; and the record shows that the dump of this Massilon furnace was examined and found to contain this material (p. 52).

Job Frogget was manager at *Brown, Bonnell & Co.'s* furnace, and said he used up all this material as made in the blast furnace, yet we find from the record that yards in Youngstown were filled with cinders from this furnace, and this material was dug therefrom and utilized by the defendants, and Mr. Brown himself admits that he dug over his furnace dumps in 1874 to get it therefrom. The same remarks will apply to the testimony of *Chas. Himrod* in this respect. He did not claim to have used the material at all until recently, and large quantities were taken from the dump of the Himrod furnace by the defendants. And the witness, *Augustus B. Cornell,* the treasurer of the Himrod furnaces, admits that they threw away this material until two years ago.

The testimony of *Joseph H. Brown* is of the same category. He says they always used up this material as made in their blast furnaces, but he subsequently admits that since the date of the patent Brown, Bonnell & Co. have been collecting and purchasing it from other furnaces, and digging over their own cinder dumps to get it out and utilize it. If it had not been thrown away they would not find it in their own dumps.

The defendant, *Homer Hamilton* himself, rebuts the testimony of these witnesses, and proves conclusively that this heavy slag material was, and always had been, treated as refuse material until very recently. I can only account for the discrepancies and apparent contradictions of defendants' testimony by supposing the furnace men referred to a different kind of material.

There is a material in the form of the runner which is nothing more nor less than pig-iron, which has solidified in the runner instead of in the pig beds.

This material, I have no doubt, has always been saved by the furnace men, and treated as scrap, by being put back in the furnace stack.

But this slag material has undoubtedly been treated as refuse by these furnace men and thrown away by them.

Defendants' own testimony proves this. They admit that up to December 31, 1874, they had collected about 1800 tons of this material, a material which they now assert has never been considered as refuse of blast furnaces.

Where did they get it?

From the furnace dumps at *Mineral Ridge; The Himrod furnaces*, and furnaces of *Brown, Bonnell & Co.*, at Youngstown; from *Niles;* from *Wheatland;* from the *Hubbard Iron Co.;* from *Lowell furnace*, and other places.

The defendant, *Homer Hamilton*, testifies that he dug it out of the yard of his foundry, and admits that he has seen it in railway embankments and other walls and roads, &c. That some of the men employed by him to collect it dug it from the dumps of blast furnaces. That he himself was hauling it to his yard along with other cinder, for the purpose of filling it up and making a gradual slope up to the foundation of the building, and finally he produces a specimen which was put in evidence, which he testifies he picked up near the railroad track.

Whether or not Vinton takes anything by his patent, he must certainly be considered as a great public benefactor, and I think the testimony fully supports the statement made in his patent, viz.:

"*Heretofore a large percentage of good metallic iron has been thrown away with the slag, and become lost to commerce so far as its use as metallic iron is concerned.*"

And it is only necessary to refer to the testimony of *Sebastian Runser*, to show to what extent the public were losers before the patent, and gainers since it was granted.

The next subject of inquiry is as to the novelty of the method employed by Vinton for recovering the iron from the slag.

The knowledge that there was iron in this slag in large quantities may have existed before—the fact may have been generally known by all furnace men—but how to get the iron out of the slag was not known to them until after Vinton showed them how to do it.

The defendants say that there was a method known prior to the Vinton discovery, viz.: by putting the material back into the blast furnace along with the ore, treating it just as they would treat scrap iron.

Of the long array of witnesses set forth in the answer as having prior knowledge, only a very few testified on this point, and, as we have before seen, large quantities of the material were collected from the cinder dumps of the furnaces, where these witnesses were employed, so that their statements as to having used this material as fast as it was made, along with the ore, cannot be accepted without doubt.

They may have referred to that other material called *runners*, which is shown to be nothing more or less than scrap iron, but supposing it to be true that this *heavy slag material*, which the defendants now call *runners*, was actually used in blast furnaces, is such method the same as that described in the Vinton patent? In other words, is the employment of a blast furnace for reducing the iron in this material the same in effect as the employment of a cupola furnace, and productive of the same result.

It was argued by counsel for defendant in the court below that there was no difference between them.

That the material being an old and well known material—coke being a well-known fuel, and limestone being a well-known fluxing material, and cast or pig iron the resulting product of both methods, being also a well-known product, there was no difference between the methods of the blast furnace and that of the foundry cupola. Nothing more than the substitution of one kind of furnace for another, and that, therefore, Mr. Vinton's alleged discovery amounted to no more than

if he had discovered that eggs could be boiled in a tea-kettle as well as they could be boiled in an egg-pan.

If this were so, there would be good reason for holding the patent void for lack of novelty, but the record shows a very different state of facts, and I think it is conclusively shown by the testimony that the operation of the two furnaces upon the material is very different. Their method of operation is quite different, and the proportion of fuel required in each to produce the iron from the material is widely different, as is also the time required to complete the process.

As to the result, it is so much in favor of the Vinton cupola, both as to the amount of fuel required, and time saved, that there seems to be no room for any question as to the two methods being radically different.

What is the testimony on this point?

Defendants' witnesses testify as follows:

Wm. B. Pollock says he used this material by putting it back into the blast furnace, using small quantities in each charge of ore in place of an equivalent quantity of ore.

Wm. Pollock says, "I always used it (in the blast furnace); had it broken up and taken up the same as stock * * * always in connection with ores.

Q. What is the effect when you put in too many of them?

A. The effect is, they cool the furnace if you have not fuel enough to keep up the heat."

The effect being that the furnace will get chilled, which involves a great loss, so that an excess of fuel is required in a blast furnace when this material is used.

Job Frogget says he used this material in a blast furnace, charging them the same as ore, making no difference, but he never used them by themselves; some do not like to use them because they are hard to smelt. We have to use more fuel when the stock melts with difficulty.

John R. Grist used this material in the blast furnace and made no change in the proportions of fuel, flux, or blast that he used for smelting ore. Never used them alone, but mixed with ore.

It would take longer to come through the stack of a blast furnace than through a cupola.

Charles Himrod used this material in a blast furnace; the highest proportion of it he used was about one-fourth, and from that down to none at all.

On being recalled, he says it takes about twenty-four hours for a charge of material to come through the stack of a blast furnace. Thinks it only takes half an hour to come through the stack of a cupola furnace. Admits that there would be an advantage in the use of the cupola furnace if the product would be the same in it as in the blast furnace. Says that he uses 200 pounds of coke and 375 pounds of coal to smelt from 400 to 450 lbs. of ore.

That he uses about an equal weight of fuel and runners or this slag material when he charges with it, his calculation being that he produced about 420 lbs. of iron from about 600 lbs. of runners by the use of about 575 lbs. of fuel, coke and coal.

When confronted with the quantities of material and fuel used to produce about the same quantity of iron from this slag material in the cupola furnace by the Vinton process, to wit; 800 lbs. of runners and 120 lbs. of coke, producing 560 lbs. of iron, and is asked which of these two processes is the most economical, he is driven to make the extraordinary answer, that if you could melt the runners in a foundry cupola for nothing it would not be so economical, because the difference in the quality of the iron produced by the blast furnace would be so much greater, yet the same witness says that there is not a particle of difference in the process of the blast furnace and that of the cupola so far as the use of this material is concerned.

It is evident that the interests and feelings of this witness have warped the soundness of his reasoning powers.

The fact remains, however, according to his own showing, that it takes more than four times the quantity of fuel to extract the iron from this slag material in a blast furnace than it does in the cupola furnace. That it takes 24 hours to perform the same operation in the blast furnace which is accomplished in the cupola furnace in less than one hour, and these facts are proved by every witness who was examined upon this point.

Joseph H. Brown, says it takes about 30 hours for a charge to come through his blast furnace.

George Boyce, says it takes from two to three and a fourth tons of coal to make a ton of iron in his blast furnaces.

Samuel Kimberly, says our furnaces use 425 lbs. of coke to 420 lbs. of ore, and it takes from 24 to 36 hours for the charge to come through the stack of a blast furnace, and it takes about 3,200 lbs. of coke to make a ton of pig iron in the blast furnace.

And being confronted with the proportions of material used and the product resulting from the Vinton process, and asked which would be the most economical, the blast or the cupola furnace, for recovering the iron from this material, he says:

"A. The cupola would be, as six hundred and eighty is to thirty hundred in favor of the cupola" (p. 165).

Norman Hall, says it would take about 22 hours to come through the stack of the blast furnace (p. 169).

See, also, testimony of *Thomas E. Blunt* (p. 163), who gives in detail the method of reducing iron from the ore in a blast furnace, and states that it takes about 30 hours for a charge to come through the stack of the furnace.

He first uses about six cords of wood, then from five to ten tons of coal; then some of the ordinary furnace cinder, and then charges with ore, coke and limestone until the furnace is full, about 300 lbs. of ore to 500 lbs. of coke and 18 per cent. of limestone.

If he was to use the heavy slag material called "*runners*" he would require the same amount of fuel, but less limestone.

It is true that, substituting the slag for the ore, the other materials employed, fuel and limestone are the same in both instances, but there the similarity ends.

Contrast the foregoing method of obtaining iron by the blast furnace with Vinton's method.

Vinton charges his cupola furnace with 1,600 to 1,800 lbs. of slag and 5 bushels of coke, has an average yield of 55 per cent. of iron from the slag, and makes about 10 tons of pig iron in from 5 to 6 hours (pp. 171–2).

There is, therefore, a very great saving in the amount of fuel used, and in the time required by the Vinton process over the blast or smelting furnace, a fact which is proved beyond all doubt or question, and, therefore, there must necessarily be a cheaper article produced by the Vinton process than by

the method of the blast furnace, and such being the case, the Vinton method is a patentable invention. If the result is thus different, the process by which the result is accomplished cannot be the same.

Vinton does not claim to be the first to use coke as fuel and limestone as a flux, nor does he claim the use of these materials in connection with a blast or smelting furnace for the purpose of reducing the iron from this slag material, but he does claim to have been the first to invent the method of recovering the iron from this slag material by means of the ordinary fuel and fluxing material in a cupola furnace. The testimony shows that the two methods are entirely distinct, so that the one would not necessarily suggest the other.

"It is settled law that there may be a patent for the practical application of a known thing to produce a particular effect.

There may be a valid patent for a new combination of materials, previously in use for the same purpose, or, even for a new method of applying such material.

If the result produced is either a new article, or a better article, or a cheaper article to the public than that produced before by the old method, it is an invention or manufacture intended by the statute, and may well become the subject of a patent."

Curtis on Patents, p. 79.

The case under consideration was the manufacture of iron by the use of anthracite or stone coal combined with a hot-air blast. The use of the hot blast being before known in the manufacture of iron with bituminous coal, and the use of anthracite coal in connection with a cold blast being also known (see Crane *v.* Price, Webs. Pat. Cas., 393, 408).

There can be no question that, by the Vinton method, iron is produced more cheaply and more quickly than it can be obtained by the use of the blast furnace.

It therefore comes within the rule of a patentable invention, so far as any anticipation through the blast furnace is concerned.

The defendants further insist that the method described by Vinton is the same as that employed for melting iron in a foundry cupola, and that the defendants have melted the slag in precisely the same way as they melt iron in their foundry cupolas.

That they proceed in the usual way, substituting slag material for pig iron, and the said slag being an old and well-known material, they claim to have a perfect right to do so, notwithstanding the patent to Vinton.

If it were true that the process of melting iron and the recovery of the iron from this heavy slag were identical, there would be great force in that argument, but it is not true.

On page 186 of the record there is a drawing representing Vinton's cupola or slag furnace, and it has a feature which no ordinary cupola furnace possesses, that is a provision for allowing the slag to flow out of the interior of the furnace, as shown at *E* in the drawing, and which is referred to in the specification in the following language, viz.: "Provision being made for the passage of the remaining slag from the furnace at a point below the tuyeres" (p. 184).

In the testimony it is referred to as the cinder notch.

Without such provision for the passage of the slag from the furnace the method would be inoperative—the slag would rise up and clog the tuyeres, and effectually stop the operation of the furnace.

Allowing the slag to flow off in the manner described is therefore an essential feature of the method or process described in the patent.

One of the defendant's witnesses, referring to this feature, says: "Then we had what we call a slag hole for slag to run from. *That is about the secret of the concern. You can't run successfully unless you have that*" (p. 36, Païsley).

On p. 37 the same witness is asked: Did you ever see or hear of a foundry cupola which had two holes when used for melting pig iron for casting? And he answered: "No, sir; I believe I did not; I have seen a good many."

The ordinary foundry cupola does not have any such provision for the escape of slag, and for the very simple and obvious reason that in melting pig iron there is no remaining slag that requires to be run off, and the two methods are therefore, in this respect, entirely distinct, so that, even supposing

that the two methods were in other respects identical, here is a material difference between them. But, say the defendants, though the foundry cupola does not have such a provision for the flow of the slag, the blast furnace has it. Vinton did not invent a furnace having a cinder notch. All blast furnaces are so provided, and having seen it used in a blast furnace, it required no invention to construct a cupola furnace with a cinder notch. That is a begging of the question. Vinton is not claiming the use of a furnace of a particular construction, and it seems to me that it is not necessary to discuss the question whether the providing a cupola furnace with a cinder notch is or not a patentable invention.

That he was the first to use a foundry cupola with a cinder notch I have no doubt, because the necessity for such contrivance did not exist until he had perfected his invention, which was the method described for obtaining iron from this slag material in a foundry cupola, an essential part of that method being the flow of the remaining slag from the furnace.

That method cannot be the same as the method of melting pig iron where there is no slag that requires to be disposed of; and, as we have seen, it is not the same method as that of reducing iron from the ore, or even from the slag material in a blast furnace, for, although the blast furnace does have the cinder notch to allow the slag to escape, practically in the same way as in the Vinton cupola, the method of the blast furnace is different in other material respects from the Vinton method. Possibly the inventor, Vinton, may have received the idea of the cinder notch from the well-known operation of the blast furnace, and he may have conceived the idea of recovering the iron from the slag from the knowledge he had of the well known operation of the foundry cupola; but neither of these methods or furnaces of itself could suggest the Vinton method in its entirety. It required some exercise of the inventive faculty to unite the two processes so as to obtain the advantages of both, and turn them to account in the new method of obtaining the iron from the slag.

Say that Vinton did get the idea of the cinder notch from the blast furnace, and the idea of intense heat with small outlay of fuel from the foundry cupola.

Did he invent nothing when he combined these ideas, and thereby evolved a new creation?

He has certainly done something which cannot be accomplished in either of the old furnaces, or by any of the old known methods, and, if this is true, he certainly has produced something new. That he has produced something useful, and of great benefit to the public, there can be no question.

If, then, he has produced something *new* and *useful*, that something possesses all the elements necessary on which to base the grant of valid Letters Patent.

I therefore submit the question of patentability to your Honors with entire confidence. The patent is not, on its face, invalid for lack of novelty.

This brings us to the consideration of the second branch of the question, viz.:

THE INVENTION OR DISCOVERY OF VINTON, BEING PATENTABLE, WAS HE THE FIRST TO MAKE THAT INVENTION OR DISCOVERY KNOWN TO THE PUBLIC, IN SUCH MANNER AS TO ENTITLE HIM TO PROTECTION OF LETTERS PATENT UNDER THE LAW.

It cannot be claimed that he was guilty of any laches, for it appears that he proceeded to take out Letters Patent immediately after making his successful experiments (p. 22).

But the defendants allege that he was not the first to make iron from this slag material in a foundry cupola by the same method described in the patent.

This I conceive to be the most unsatisfactory defense made by defendants, and the most difficult to deal with, as it rests solely upon the depositions of witnesses whose testimony is of a most contradictory character.

There is no prior patent or publication describing the invention.

Defendants' answer alleges prior knowledge and use at some 18 different places—a public use said to be known to 52 persons, whose names are given; only 12 of whom testify in the case on behalf of defendant.

Of these, *Wm. B. Pollock*, *Wm. Pollock* and *Job Frogget* say they had used these so-called "*runners*," or seen them used, by being put back into the stacks of blast furnaces, but neither of them ever saw this material used in a foundry cupola prior to

the date of the patent, so that their testimony requires no further consideration in this branch of the inquiry.

Homer Hamilton, the defendant, testifies that previous to March 25, 1873, he had a talk with a *Mr. Kennedy*, and agreed to melt runners.

That he collected an amount of runners, and March 25, 1873, did melt the first lot, but did not melt any more until Sept. 30, 1873.

The latter date is unimportant, for the reason that it is subsequent to the date of Vinton's invention, which was completed on the 18th and 19th days of September (p. 22); but the date March 25, 1873, is material, and if it is proved by undoubted testimony that he did make iron from this slag material on that day, in the same way as described in the Vinton patent, he anticipated Vinton's invention.

We say that it is not true; that the testimony of the witnesses brought to support the statement is so contradictory as to be unworthy of belief, and it is rebutted by the testimony of disinterested witnesses, who show conclusively that no such experiment as this of March 25, 1873, was ever made.

The testimony of the defendant, Homer Hamilton, is in effect that prior to March 25, 1873, he had collected from 100 to 150 tons of this slag material, which he calls runners, in the yard of his new foundry, to which foundry he alleges that he moved sometime in the month of February, 1873.

That he got some of that material from the new yard, which he was filling with cinder, and from the yard of his old foundry, from which he had moved, and some from other places, which he did not remember.

That on the 25th day of March, 1873, he made about a ton of pig-iron from this material in his cupola furnace, which furnace did not then have the cinder notch or any provision for the passage of the cinder from the furnace, except by the ordinary tymp or tapping-hole, from which the molten iron is drawn.

That this took place in the presence of Gerwig, Meadsker, Kirchbaum, Mulhannon and Charles Himrod, he thinks. All the rest of the workmen of the foundry being away, engaged in holding forcible possession of a railroad, where they had been from 36 to 48 hours previous, night and day, exposed to sleet

and rain. And that it took from one to three hours after the blast was put on to make the ton of iron from the slag.

The witnesses produced to corroborate these statements are two of his workingmen, Meadsker and Mullhannon.

The testimony of these two witnesses agrees with that of the defendant, Homer Hamilton, in so far only as to the date of the alleged operation and the circumstance by which they fix the date. But when we come to examine and compare their testimony as to the details, we find it conflicts in almost every particular.

Hamilton swears that his men had been guarding this railroad for 36 or 48 hours previous to the 25th of March, which would carry it back to the 23d day of March.

Meadsker says it was the day previous, to wit, the 24th; and Mullhannon says they all came to work the morning of the 25th, and it was that morning that they were sent for to guard the railroad, and that they were on the railroad when he was sent for, at 11 o'clock.

Again: Hamilton swears that he had from 100 to 150 tons of runners collected in a pile at his works before the 25th of March, and that he procured it from the yard of his new foundry, and that some of it was hauled from the yard of his old foundry before that date.

While Meadsker says that only some five or six tons of this material was got from the yard of the new foundry, and that there never was any dug or hauled from the yard of the old foundry.

Mulhannon also swears that he never saw any of this material at the old foundry; that the runners he used on this occasion were got outside of the shop; that he never saw any dug out of the yard.

Again: Hamilton swears that on this occasion, March 25, 1873, they did not have any cinder notch in their cupola, through which to run off their cinder, while Mullhannon swears positively that they did make a hole above the tapping-hole, and run the cinder out of it.

Hamilton says that his men were exposed to sleet and rain.

Mullhannon says it was a fine sunshiny day.

Again: Hamilton swears that the operation took from one to three hours after the blast was put on, while Mullhannon swears that they did not put on the blast until 3 or 4 o'clock in the

afternoon, and finished the operation in about three-fourths of an hour.

Hamilton says he thinks Himrod was present on that occasion. Meadsker says Himrod was not there until sometime in the fall of 1873.

Meadsker says that he was engaged in this railroad difficulty on the 24th of March, and all that night.

In another place he testifies that he was at the foundry, and saw Mr. Stambaugh there on the 24th of March. Mullhannon did not see Mr. Stambaugh at the works, and has not seen him there more than three or four times since the shop was put up; while Hamilton says the trial was made at Mr. Stambaugh's request.

Again: Hamilton swears positively that he did not make any iron from this material between the 25th of March and September 30, 1873, while Meadsker swears positively that they made some one hundred tons of it during the month of September, 1873.

The statement of the witness Himrod is that he came to Youngstown in February, 1873, made the acquaintance of Homer Hamilton a few weeks thereafter, first conversed with him on the subject of using this material, in March or April, 1873. Had subsequent conversations with him every week or ten days thereafter, in one of which conversations Hamilton told him he had an idea that he could make a better use of this material than putting it back into the blast furnace, *and was going to try it*, and that in May or June or summer of 1873, he actually did see him making pig iron from it in the new foundry of Homer Hamilton & Co., and did see three or four tons of pig iron made by this process at that time.

This statement is in direct conflict with the testimony of Homer Hamilton, who says he did not make any iron from this material until the 30th day of September, 1873, except about one ton, which he alleges that he made in the month of March, 1873.

Himrod swears that some time subsequent to March or April 1873, Hamilton told him that he had an idea that he could make some use of the material and *was going to try to do so*, and did try it in May or June, 1873, while Hamilton swears that he did make a trial of it March 25, 1873, but did not make any more if it until September 30, 1873.

We submit that no reliance can be placed on such conflicting testimony.

On the other hand, the testimony of one of the workmen of Homer Hamilton & Co., who was in their employment from the first week in January, 1872, until the latter part of October, 1873, says there never was any iron made from this slag material in that foundry during that period (Darby, p. 157-8.)

The testimony of *John J. Vinton* (p. 23) shows that *Mr. Gerwig*, in the presence of *Mr. Todd*, two of the defendants in this case, said they had not commenced melting this material in their foundry until the last of October, 1873. This evidence stands unquestioned by Gerwig or Todd, or any one else.

Another of the workmen of Homer Hamilton & Co. confirms this statement as to the time when they commenced operations on this material, and says it was in October, 1873.

We submit a comparative statement, arranged in tabular form, of the testimony of the several witnesses, on the alleged prior use by defendants on the 25th day of March, 1873.

Table showing the Conflict of Testimony regarding the Alleged Prior Use by Defendants, March 25, 1873.

	HAMILTON.	HIMROD.	MEADSKER.	MULLHANNON.	DARBY.	GERWIG & TODD.	FISHER.
Dates when defendants first commenced operations	March 25, 1873.	May or June, 1873.	March 25, 1873.	Thinks it was March 20, 1873.	Last of October, or beginning of November, 1873.	Last of Oct., 1873.	October, 1873.
Where material operated upon was obtained with which the alleged trial was made.	From yards of old and new foundries.		None taken from old yard; 5 or 6 tons got in new foundry yard.	None taken from old yard; none dug from either yard; what was used came from outside of shop.	None taken from old yard; never saw any there. Did not see any in new yard at that time.		
Parties said to be present at the time.	Gerwig, Meadsker, Kirchbaum, Mullhannon, Himrod.		McAndrew, Mulhannon, Kirchbaum, Beilcie, Hamilton, Gerwig. Himrod was not there until the fall.	Meadsker, Kirchbaum, Beileie, Hamilton, Gerwig and McAndrew.			
Quantity of iron said to be made.	About 1 ton.	3 or 4 tons.	1 ton.	Don't know.	None until last of October.	None until last of October.	None until October.
Quantity of material said to be on hand at time of first trial.	100 to 150 tons.	40 to 50 tons.	About 70 tons.	Don't know.	None.		
How furnace was said to be fixed with regard to cinder notch March, 1873.	Did not have any cinder notch at that time; cinder came through tapping-hole.			Did make cinder hole at that time above the tapping hole, and cinder came out that way.			

In brief, the testimony regarding said alleged use is conflicting and unsatisfactory. The statements of the witnesses regarding alleged facts and circumstances cannot be reconciled. Their interests appear to have disturbed the accuracy of their recollection, while witnesses who have no interest in the matter swear that no such occurrence took place.

The burden of sustaining their answer by proof is on the defendants, and if the testimony is so conflicting as to leave the question in doubt, it should be decided against them.

"In a question as to the orginality of an invention, where one party has a patent, the proof of want of originality must be specific and decisive to overthrow such patent."

Troy Iron and Nail Factory *vs.* Corning, 1 Blatchford, 472.

"If a reasonable doubt exists as to the truth of the evidence adduced to impeach the novelty of the invention, the presumption in favor of the patentee must prevail over it."

Crouch *vs.* Speer *et al.*, Official Gazette, vol. 6, page 187.

Hawes *vs.* Antisdel, Official Gazette, vol. 8, page 685.

Stilwell *et al. vs.* Cincinnati Gas Co., vol. 7, O. G., p. 829.

Next, defendants produce witnesses to prove prior knowledge and use of the invention at Beaver Falls, Pa., by the Beaver Falls Co-operative Foundry Association.

Robert Paisley, the superintendent of said company, testifies that they had tried about 900 pounds of this material in their foundry cupola somewhere about April, 1872; that the metal was cast in the sand in chunks, not in regular pigs; that they afterwards used them in connection with pig-iron for casting stove plates. He says (p. 36):

"A. There was not much talk about it; there were very few that knew about it.

Q. Who were those few that did know about it?

A. Mr. Sennett, myself, William H. Paisley, a son of mine; the most of the moulders, I suppose, knew about it; they were

all stockholders; *but we did not want outsiders to know it, that is, the public; if it was a good thing we wanted to keep it to ourselves;* * * * I believe all the workmen at that time were stockholders."

In describing the cupola he used he says:

"The charging hole was the same as in other cupolas; the tapping hole was just the same, too; then we had what we call the slag hole for the slag to run from; that is about the secret of the concern; *you can't run successfully unless you have that.*"

In another place the witness says he did not come to Beaver Falls until April, 1872.

The witness, *William J. Shaner*, was called by defendants to corroborate the testimony of Paisley, and he is asked to describe what was done on the occasion referred to, and says he prepared the cupola for the experiment.

"I chipped it out, plastered it up, put up my bottom, put in a bottom of sand, started the fire, put in the breast, put in sufficient coke to make a bed and then charged the runners."

"Q. *Did you melt any iron in the cupola that day before making the experiment?*
A. *No, sir.*
Q. After the material was melted did you see them cast?
A. I did.
Q. Describe how that was done?
A. It was taken away in ladles and made into pigs in sand."

He also says that the amount of iron obtained by this experiment was less than 600 lbs. He was a member of the association at the time. Says that he did not make the result of the experiment known, that no strangers were present, and that no cinder hole was in the cupola when the experiment was made.

On re-examination he is asked the question:

"Q. *You say in your cross-examination that you did not tell others about making pig iron from runners at the time you made the experiment. State whether or not you did afterwards?*
A. *I did not.*"

The witness, *Thomas W. Kennedy*, who appears to be interested as a partner in the slag business carried on by the defendants, says, that though he had not worked this material in a cupola furnace himself, that he was present at Beaver Falls and saw it used, and had supplied them with the material that was used, and had suggested the making of the cinder hole in their cupola.

There is as great a conflict in the testimony regarding this alleged prior use as in the experiment which Homer Hamilton is said to have made in March, 1873, as will be seen by the following tabular statement :

TABLE, *showing the Conflict of Testimony regarding the Alleged Prior Use at Beaver Falls, Pa.*

	PAISLEY.	SHANER.	KENNEDY.
Preparation of the cupola.....	Says that it was at the close of a heat after melting and casting pig iron from the cupola. The cinder hole was made in the cupola at the time.	Says the cupola was specially prepared for the purpose; they had not melted any pig iron before melting the slag. There was no cinder hole in the cupola at the time.	
Process of casting and product...	700 lbs. of iron from 900 lbs. of slag cast in chunks in the sand.	Less than 600 lbs. of iron from 900 lbs. of slag cast into pigs in moulds prepared for it.	
Parties present.....	No strangers. All members of the Association, and they kept their knowledge from the public.	No strangers. Possibly some persons belonging to Beaver Falls. They kept their knowledge to themselves and never told anybody about it.	Says he was present and saw them using runners in their cupola, and suggested the making of the cinder hole.

The only fact as to which they do agree is, that all knowledge of what they were doing should be kept from the public, and they wanted all the benefit for their own advantage.

The alleged prior use by the Beaver Falls Foundry Association, supposing it to be proved, which we expressly deny, is not a public use under the statute.

Public use is opposed to private use. If a man has an invention and uses it privately for his own benefit, then such use of it cannot debar another person from an invention or patent of it.

Adams *vs.* Edwards, Mass., 1848.

"By knowledge and use the Legislature meant knowledge and use accessible to the public."

Cahoon *vs.* Ring, 1 Fisher, 410.

"By knowledge and use referred to in the act is meant knowledge and use existing in a manner accessible to the public."

Gayler *vs.* Wilder, 10 Howard, 496.

In which case it was also held that "the patentee was to be considered as the first and original inventor in the meaning of the patent laws of the United States, notwithstanding the prior use by C., the patentee being in reality the first to confer on the public the benefit of the invention."

"A patent raises the presumption that the grantee is the first inventor of the article monopolized; and to overcome this, it must be shown that there was a prior knowledge of the invention under such circumstances as to give the public a right to continue the use of it."

Crouch *vs.* Speer *et al.*, Official Gazette, Patent Office, Vol. 6, page 187—1874.

We therefore submit that it is immaterial to the issue whether or not this slag material was used at Beaver Falls in 1872, such use, by the admissions of the parties themselves, not being accessible to the public, but made for their own private advantage. But the testimony regarding this alleged use is so conflicting that a reasonable doubt must arise as to its truth; such a doubt as will not overcome the presumption in favor of the patentee.

Next.—Defendants allege prior use at *Bordentown, New Jersey, by William McFarland*, who testifies that he obtained a

patent in 1858, for a cupola furnace for the purpose of melting iron, and says:

"He constructed a furnace in 1857 or '58, at St. Louis, Mo. That furnace was constructed for melting iron for castings, and I melted ore in it, but did not melt slag or other refuse of blast furnaces in it for any purpose."

The witness, Paisley, in his testimony, says he obtained his first knowledge of the matter from this witness, McFarland, a good while before the war, and this witness, McFarland, is asked if he did inform Paisley as to melting runners and slag in his cupola furnace, and he replies that he did tell him all about his patent furnace and the melting of ore therein, as above stated, and that he told all his acquaintances about it the same as he did Paisley; but as he had not used runners in his furnace at that time he could not have so informed Paisley, another evidence that the memory of Paisley is not reliable.

McFarland does say that in 1864 he constructed one of his patent cupola furnaces at Hopewell, Chester County, Pa., and experimented with it for the purpose of getting iron out of the cinder of a cold blast furnace after the iron was ground out of the cinder in a tumbler, but it proved a failure and he gave it up, notwithstanding that iron had advanced from $50 to $90 a ton during the time he was experimenting.

He never tried to melt cinder or slag or refuse of blast furnaces in an ordinary cupola furnace.

With regard to the furnace he constructed at Hopewell, he says that after he abandoned the experiment he removed it to Philadelphia, sold different portions of it to different parties, and does not know where any portion of it now is.

This testimony certainly does not show a prior use of Vinton's process for recovering iron from the heavy slag of blast furnaces in a cupola furnace provided with a cinder notch, as set forth and claimed in the patent.

The experiment he did make by trying to grind the iron out of the cinder, and then melting in his patent cupola, is not the Vinton process, and even if it were what McFarland did amounts to no more than an abandoned experiment.

"The devices employed in abortive and abandoned experi-

ments do not become public property, and are no bar to a patent embracing them obtained by an independent and successful inventor, afterwards."

Aultman *vs.* Holly, 11 Blatch., 317.

"The previous production to a limited extent of goods resembling those fabricated by the plaintiff's process, and by means somewhat similar, held to have amounted to no more than abandoned and unsuccessful experiments, and not to impeach the validity of his patent."

Smith *vs.* Glendale Elastic-Fabric Co., Official Gazette, Vol. 5, page 429.

"It can hardly be doubted, if any one discovered an art which had been long lost, and it was a useful improvement, that upon a fair construction of the patent laws he would be entitled to a patent. Though not literally the first and original inventor, he would be the first to confer on the public the benefit of the invention. He would discover what is unknown, and communicate knowledge which the public had not the means of obtaining without his invention."

Gayler *vs.* Wilder, 10 Howard, 497.

Next, we have the testimony of *N. B. Hatch*, which is objected to by complainants, for the reason that no notice was given thereof in defendants' answer. It is of the same category as that of McFarland.

He alleges that he experimented with this material in a foundry cupola about the year 1856, but the furnace was abandoned and pulled down and disappeared a year or two after it was built.

We do not admit the testimony of this witness as competent under the rule, and we only refer to it in order to show the desperate character of defendants' testimony, and the recklessness of the witnesses produced by them.

This man Hatch claims to have made iron from coal at a date prior to the use of coal in this country for that purpose, so far as written records show.

There is no mention of the furnace which he alleges he built, in any printed history of the iron manufactures of this country. He swears that one *George J. Norish*, informed him that this slag material had been converted into iron at the *Superior Iron*

Works, Alleghany, Penn., four years ago, and that he had known *Norish* about two years.

Complainants take the testimony of this man *Norish* and he denies having made any such statement, pp. 181–2.

Further comment on such testimony as that of Hatch is needless.

Another of their witnesses by whom they seek to prove prior use is *John Enwright*, of Sharon, Pa., who says that he built a cupola 3 years ago next July, for the purpose of melting furnace runners or this slag material.

He gave his testimony in the spring of 1875, and therefore, according to his statement, he must have built this cupola in July, 1872.

With respect to its use he is asked:

"Q. State whether you completed it and melted any slag or runners at it?

A. Yes. I had it ready for work except some of the machinery, I melted a small portion but not in the cupola.

Q. How did you melt that you speak of?

A. In a piece of pipe with some charcoal and a hand bellows.

Q. State whether or not you got the iron out of it in that way?

A. I satisfied myself that there was iron there, I melted it for curiosity and to satisfy myself."

The object the defendants had in view in taking this man's testimony was to show that Vinton obtained the idea of his invention from him, and he is made to say that he saw Mr. Vinton in July, 1873, at said cupola which he built in 1872. But he is asked the question:

"Q. Did you have any conversation with Mr. Vinton about what you had built that cupola for?

A. We were talking of melting iron in small cupolas; I don't mind what we said; I was telling him of a little place in the old country where I made nails; there was nothing said in regard to my place here."

He makes the extraordinary statement that some fourteen or fifteen years ago in the old country, he melted part of an old pot in an old tea-kettle with a hand bellows.

It also appears that after Mr. Vinton got his patent and commenced to make iron from this material, Enwright went to

The witnesses who testify regarding it on behalf of the defendants, are all interested witnesses, under the control of the defendants; *per contra*, di-interested testimony is given which shows that no such experiment could have taken place.

Defendants themselves did not appear to be satisfied with such testimony, or that they could safely rely upon such proof of positive prior knowledge and use of the process claimed in the patent, and they have therefore sought to make it appear that the invention was anticipated by a prior use of the material by the furnace men who made it, said alleged prior use consisting of the putting of the material back into the blast furnace to be smelted and reduced to metallic iron, as before referred to.

Their effort in this line of defense has also failed for the following reasons:

Because the testimony regarding such prior use of the material is contradictory and conflicting; and because the use of the material by putting it back into the blast or smelting furnace is an entirely different process from that claimed in the patent.

It must not be forgotten that the defendants in their answer allege prior knowledge and use by no less than 52 witnesses, whose names and addresses are therein set forth; and of that vast array of witnesses they only took the testimony of 11; and of these 11, eight admit that they never used this slag material in a cupola furnace, while of the three remaining, one, to wit: Wm. McFarland, says that he never used it in such a cupola furnace as is described in the patent, and the use of which is a part of the process claimed in the patent. The second, to wit: Robt. Paisley, whose truthfulness is open to question, says that he did use it, but kept the knowledge of its use from the public; and the third is Homer Hamilton himself, who alleges that he made an experiment by making one ton of iron from this material in March, 1873, at the nominal cost of the fuel used in the process, a result with which he was perfectly satisfied at the time, yet he admits that he did not make another pound of iron until September 30, 1873, while he had purchased, in the interval, a very large amount of iron, at from $50 to $55 a ton.

According to his own showing, he was guilty of laches in a most extraordinary degree.

Of the other witnesses whose testimony has been taken, to wit: William B. Pollock, William Pollock, Job Frogget, Charles Himrod, Thomas W. Kennedy, Augustus B. Cornell and Joseph H. Brown, the only use of this material which they allege to have made is, that they put small quantities of it back into their blast furnaces along with the ore to be smelted.

Their testimony in this respect has already been referred to, and it has been shown that quantities of this material have been recovered and utilized since the date of Vinton's patent from all, or nearly all, the refuse piles of the furnaces under their charge.

What have the 41 witnesses who are cited by the defendants, but whose testimony they failed to take, to say on this matter?

Why did the defendants fail to take the testimony of these witnesses? Evidently, because they found that their testimony would not answer their purpose. That is a fair presumption, and the complainants have proved that it is correct.

They have proved it by *subpœnaing* some of the most prominent of the witnesses cited by the defendants—witnesses whose position and experience in the iron business should be a guarantee of the correctness of the information they give, especially when we consider that they testify against their own interest.

I refer to the depositions of Samuel Kimberly, George Boyce, Alfred N. Curtis and A. B. Llewylin, all prominent men in the iron business, and cited in defendants' answer as having previous knowledge of the Vinton method, but who all deny that they ever knew of it until after the patent issued.

Such testimony, if it proves anything, is proof that the use of this material was not known to those engaged in the iron business, but the best proof of this is the fact already shown, to wit: that the material itself is found amongst the refuse of all blast furnaces, and that thousands of tons of it have been thrown away as entirely useless for the purpose of making iron.

In view of the testimony, therefore, we insist that the de-

fendants have failed to make good their defense, for the following reasons:

First.—Because they have failed to show that the process described in the patent is not a patentable invention. It is a different process from that of the smelting furnace, and different from that of the ordinary foundry cupola.

Second.—Because they have failed to show that Vinton is not an original inventor. He having conceived the idea and put it into practical use of his own volition, without having received the idea from the knowledge or experience of others.

Third.—Because they have failed to show that Vinton was not the first, original inventor to make the discovery known in such manner as to be of benefit to the public, or that the invention was known and used by the public before Vinton made his discovery known.

Fourth.—Because the alleged prior use by the defendants is not proven.

With regard to the alleged prior use by the defendants in March, 1873, it does not appear to be a good and sufficient ground for defeating the patent, even if it were proved beyond a doubt that the trial did take place at the time alleged.

By the admissions of the defendants they did nothing more than satisfy themselves that they could make iron from this slag or refuse material of the smelting furnaces.

They did not alter their furnace in order to adapt it to the use of this material by making a cinder notch in it; they only melted about 4,000 pounds of the material, and with a cupola of the capacity used by them, and the manner of casting they describe, to wit:—running the metal into ladles or pots and from thence into moulds—it would be next to impossible to keep the iron separate from the slag or cinder. Supposing they managed to do so, and that they were, as they allege, perfectly satisfied with the result, the question naturally arises: Why did they not continue to make the iron from the material? Why did they wait until after Vinton had made the discovery a practical success before going to work on it? Why did they

continue to pay from $50 to $55 per ton for the 1,800 tons of iron which they used in the interval, when they could make it for little or nothing from the material which they say they had piled in the yard, and which, after Vinton's patent, they did use in place of purchased iron?

I can find no answer to these questions which will afford a reasonable excuse to my mind. I cannot conceive how any one who was working for profit could suffer such a valuable discovery to remain dormant when all the means necessary to make it of avail were right at hand.

If Homer Hamilton had the knowledge he says he had in March, 1873, he was guilty of *laches* in not availing himself of it until October, 1873. Such a delay would work a forfeiture of any right to the invention or discovery which he might have had, and such use cannot affect the rights of an original inventor who has put the discovery into practical use, made it known to the public, and obtained Letters Patent therefor.

"The prior construction and use of a thing in one instance only for private use, and which had never been brought to the knowledge of the public, and which had been abandoned before the invention of the same thing by another who obtained a patent for it, will not invalidate such patent."

Gaylor *v.* Wilder, 10 Howard, 496, 498.

Again, the furnace with which Hamilton says he experimented in March, 1873, did not have a cinder notch or any provision for the passage of slag. It was not until after Vinton had completed his invention and applied for his patent that we find him actually engaged in the business of making iron from this material, and when he does go to work we find him using this essential part of the Vinton method.

If you cannot run the furnace successfully without the cinder notch, the invention was incomplete when the alleged experiment was made by Hamilton in March, 1873. Hamilton, by his own admission, did not therefore complete the invention until after Vinton did so. His furnace was not perfected and adapted to the use of this material until after Vinton had adapted Mc Gilvray's furnace for the use of this slag, and had made the iron in it after being furnished with the cinder notch.

"He is the first inventor in the sense of the patent law, and

entitled to a patent for his invention, who first perfected and adapted the same to use; and it is well settled that until the invention is so perfected and adapted to use, it is not patentable under the patent law."

Washburn *v.* Gould, 3 Story, 122.
Cahoon *v.* Ring, 1 Clifford, 612.
Seymour *v.* Osborn, 11 Wallace, 516.

And in same connection

Johnson *v.* Root, 2 Clifford, 123.
Gaylor *v.* Wilder, 10 Howard, 498.
Parkhurst *v.* Kinsman, 10 Blatchford, 494.
White *v.* Allen, 2 Clifford, 230.

Vinton was therefore not only an original inventor or discoverer of a new and useful process or method of manufacturing iron from the refuse material of blast or smelting furnaces, but he was the first to perfect the invention and adapt it for use by the public, and the first to make the invention or discovery known in such a manner as to be of benefit to the public. He has complied with the law in every respect, and is therefore entitled to protection by the Letters Patent which were granted to him.

Letters Patent are granted as an encouragement to inventors, who make their invention known so that the public may have the benefit after the expiration of the patent.

A patent is therefore a contract or in the nature of a contract between the public and the inventor, the consideration being on the part of the inventor, his making the discovery known, the consideration on the part of the public being the exclusive right to the use of the invention for a limited period of time.

Vinton has filled his part of the contract by inventing and describing a practical method or process by means of which immense quantities of good metallic iron can, and are now being, recovered from refuse material, and by making known to the public a discovery which proves to be one of the most valuable yet disclosed in the history of the manufacture of iron.

He now appeals to this court for the fulfillment of the contract on the part of the public.

On the Question of Infringement.

The decision of the court below being that the patent is void for lack of novelty in the invention claimed; the question of infringement does not come up on the assignment of errors, but should this court overrule the decision of the court below on the question of novelty and patentability, there still remains to be considered the denial of the defendants that they infringe the patent. This issue is, of course, within the jurisdiction of this court, although not passed upon by the court below, and I therefore think it necessary to discuss the question.

Do the defendants infringe the patent?

The question calls for a more critical examination of the patent than given in the introductory part of this brief.

The defendants in their answer say that they have not manufactured iron "from the slag or refuse of blast or smelting furnaces in the same way or by the same method; or in "substantially the same way or by substantially the same "method," as described in Vinton's patent.

In other words, they deny that they use the same means, or substantially the same means, for recovering the iron from this material, as that described and claimed in the patent, and that, therefore, they do not infringe upon any rights secured by the patent.

What is the Patent for?

The patent, as the title shows, is granted for an "Improvement in the manufacture of iron from blast furnace slag." The claim is "The herein-described method of reducing iron from the slag or refuse of blast or smelting furnaces, substantially as set forth."

That is, for reducing the iron from this refuse material by substantially the same process set forth in the specification. Note the use of the language "*slag or refuse* of blast or smelting furnaces."

The specification describes this kind of material as the "*heavy slag*" of the smelting furnace; further, that it is a material "*containing a large percentage of good metallic iron;*"

further, that the material "*has a thick consistency and cools with a general grayish color, and is of comparatively great specific gravity.*"

The testimony proves (as stated in the specification), that this material has been thrown away and become lost to commerce until utilized through the discovery of the patentee Vinton.

What is referred to in the claim, as the method substantially as set forth?

The words substantially as set forth refer us to the specification, and from it we find that the *object* of the invention is to *reduce the metal contained in this heavy slag material.*

To accomplish the desired result the inventor employs a *cupola furnace*, or a furnace specially adapted for the purpose *to be used in connection with a blast furnace.*

The defendants have tried to make it appear that "cupola furnace" means a blast furnace, or a furnace used for smelting iron from the ore, but the language used in the specification shows conclusively that no such construction can be placed upon it, a cupula furnace is an ordinary cupola furnace such as are used in foundries. And if none such is convenient, Vinton suggests that such a furnace may be built and used *in connection with* the blast furnace where the iron is made.

If he meant a blast furnace, why build another furnace? why not use the furnace already there?

The language used shows that he did *not* intend that the blast furnace itself should be used for the purpose.

The cupola furnace referred to cannot therefore be a blast or smelting furnace, but what is usually known as the foundry cupola.

Referring to this particular kind of furnace, Vinton says in his description of the operation that provision is made for the passage of the remaining slag from the furnace at a point below the tuyeres.

What is here referred to is a *cinder notch*, which is located in the furnace he is now using, about three inches below the tuyeres.

One important part of the method described in the patent is therefore *a cupola furnace having a cinder notch or such provision for the passage of the slag from the furnace at a point below the tuyeres.* Not a blast or smelting furnace, for such certainly

never was intended to be used in this process, as must be evident from a fair construction of the language of the specification.

The next part of the method or process described in the specification is the preparation of the material; that is, the heavy slag is pulverized or broked up into shall pieces, suitable for charging the cupola.

The testimony shows that the material as made is in very large pieces, so large that it be would impossible to handle them; it has to be broken up before it can be removed from the trough of the blast furnace, and sometimes has to be again broken before it can be charged into the cupola.

The specification says small pieces, and doubtless the best results may be accomplished by breaking it into very small pieces. But at best the term used is one of comparison, and the inventor cannot be held to limit himself to pieces of any particular size. The specifications of patents are to be construed liberally. A fair interpretation of this part of the specification would therefore be that the material was to be broken into such pieces as would be convenient for handling and charging into the cupola.

In the case of Mowry *vs.* Whitney (14 Wallace, 620, U. S. S. C.), part of the process was described in the specification to be the heating of the car wheels to a degree of heat "*a little below that at which fusion commences.*" The defendants insisted that the patentee was held to that high degree of heat, and that they did not infringe because they did not heat their wheels to anything like so high a degree of heat, but the court held that if they heated the wheels to a degree sufficient to accomplish the desired result they did infringe, as in such patents for processes some latitude must be given to the judgment of the operator. Therefore the patentee, Vinton, cannot be held to any specific size of the pieces of material, any more than Mowry was to the specific degree of heat.

The pieces are to be of a size convenient for handling—that is sufficient.

The inventor further says, that the material *may be* made granulous or spongy, by passing water or air through it while in a molten state, &c.

It is well known that water has this effect upon slag when applied to it in a molten state, and the inventor so declares,

but that forms no essential part of his process or method, and the patent could not be evaded by a party who did not render the material granulous or spongy in this way.

The next part of the process is the preparation of the furnace and charging of the material therein.

A bed of coke or other suitable fuel is first placed in the cupola, then a shall quantity of oxidized iron is sprinkled over the coke, next the material is introduced as evenly as possible, and on top of that a small quantity of limestone and so on, as the operation goes on, fresh charges and materials being supplied.

After the furnace is in operation the quantities being in proportion of three bushels of coke, 50 lbs. oxide, 800 lbs. slag, $\frac{1}{4}$ bushel of limestone.

And the inventor distinctly says that these proportions may be varied as occasion requires.

He then proceeds to show how the quality of iron may be improved, should there be much sulphur in it, by blowing certain ingredients in through the tuyeres; but this forms no essential part of the method or process claimed, and is merely a suggestion to be called in operation under certain contingencies or be omitted altogether.

The process or method covered by the patent is, therefore: 1. In the employment of a cupola furnace having provision for the passage of the cinder from it at a point below the tuyeres. 2. In the preparation of material to be operated upon, by having it in pieces of suitable size. 3. In preparing the cupola for the reception of the material, by putting in a suitable bed of coke. 4. By charging the material into the furnace with a suitable quantity of fuel, limestone and oxide, the proportions of which may be varied as occasion requires.

It will be remembered that this specification was prepared very shortly after the practical tests made by Vinton on 19th and 20th days of September, 1873.

The application for the patent, as the specification shows, having been filed in the patent office on the 3d day of October, 1873.

Now, with the practical experience of some eighteen months, the patentee is examined as to his present method of operation, and testifies as follows:

"A. In the first place I let the fire come through the bed of coke, which I have stated; I found it in my experience that I could vary the quantity of materials used to make iron from this slag, by charging upon my bed of coke from sixteen to eighteen hundred pounds of slag to about five bushels of coke, after my bed is put on; I continue in that way until I am through my day's work; in place of using the scrap iron, I have found that there is oxide enough in the slag to do the work; I make on an average of about ten tons of pig iron a day; I use about a half a bushel of lime to a charge.

Q. Then you make the charges larger, though in about the same relative proportion as described in the patent?

A. Yes, sir.

Q. Is there any difference in the size of the cupola in which you are now working and that in which you tried your experiments?

A. Yes, sir; my cupola is now larger than the one in which I made my experiments.

Q. In the patent you say that provision is made for the passage of the slag from the furnace at a point below the tuyeres; what do you refer to?

A. To my cinder notch; there is a passage to run off the cinder; I have it in my present cupola, about three inches below the tuyeres.

From which it will be seen that he still uses a cupola furnace having a cinder notch, or provision for the passage of the cinder at a point below the tuyeres, the only difference between them being that the furnace he now uses is larger and of greater capacity than the one he originally used; this increase in size enabling him to make the charges larger, or, in the words of the patent, "*to vary the proportions as occasions require;*" thus he charges sixteen to eighteen hundred pounds of the slag material to five bushels of coke, instead of eight hundred pounds of slag to three bushels of coke, thereby effecting a saving in the quantity of fuel; the proportion of lime is about the same; that is, where he charged eight hundred pounds of slag he used one-fourth of a bushel of lime, and now, when he charges sixteen hundred pounds of slag, he uses one-half bushel of lime.

He does not find it necessary to use the oxide of iron, because he finds sufficient oxide upon the slag material itself to produce the required result.

The process or method is the same as that covered by the patent, the only difference being the variation in the propor-

tions of the materials, said variation being such as *occasion requires.*

What method or process do defendants employ to accomplish the same result?

I refer first to defendants' testimony, deposition of *Christopher T. Meadsker,* the foreman of Homer Hamilton & Co.'s foundry:

On cross-examination he is asked the question:

"Q. How do you usually charge the cupola with this material after it is in operation?

A. Ten hundred of runners; about one hundred of coke to each three hundred of runners; * * * I can't say that we use that to every ten hundred; that includes the bed, and is the average of the day's run; we only use three or four bushels to the charge" (p. 145).

They therefore use from three to four bushels of coke to one thousand pounds of the slag material, which is substantially the same proportion as that set forth in the patent, to wit, three bushels of coke to eight hundred pounds of slag.

Again:

"Q. Before proceeding to work this slag in a cupola do you first put in a bed of coke?

A. Yes, sir.

Q. Do you next put in the runners?

A. Put in runners and limestone.

Q. Do you put in the runners as you find them, or as they come from the furnace cinder dump?

A. Put in the runners just as they happen to lay in the pile" (p. 146).

This is the same or substantially the same method of charging the material as that described in the patent. The defendants do not add the oxide to the material, but they use the slag as it comes from the furnace dumps, and which has sufficient oxide on it to produce the desired result and meet the requirements of the patent.

Again:

"Q. In your operations with this material, is the furnace an ordinary cupola furnace?

A. It is a common cupola (p. 145).

* * * * *

Q. Do you have a cinder hole besides the ordinary tapping hole in the cupola?

A. Yes, sir; when smelting runners" (p. 146).

Thus the defendants employ a cupola furnace having provision for the passage of the cinder therefrom, the same as the furnace employed by Vinton and described in the patent. They first put in a bed of coke, and then charge the material and fuel, in the same or substantially the same proportions as that set forth in the patent, and, by so doing, they must infringe upon the right secured by said patent. They operate on the same material, employ the same appliances, use the same ingredients in the same or substantially the same proportions, and produce the same result.

The testimony of Meadsker is corroborated in this particular by defendants' witness, *Owen Mullhannon*, the cupola tender in defendants' foundry, and also by the defendant, *Homer Hamilton*, himself. In his cross-examination this witness, having previously denied the use of any of the iron oxide, is asked the question:

"Do you now say that you never used any oxidized iron in connection with furnace runners in making pig metal from that material in a foundry cupola?

A. I put the material through the cupola to separate the metallic iron from everything else.

Q. Question repeated.

A. In using runners *there is small quantities of oxidized iron adhering to it, and all is put into the cupola together*" (p. 109).

In other respects the method or process described by the withness is the same or substantially the same as that set forth and claimed in Vinton's patent.

But the defendants say that they do not employ the same process or method because they do not take iron oxide by itself, and sprinkle it or put it into the furnace.

Vinton says that it is not necessary to do so when the material operated upon itself contains a sufficient quantity. The object of putting it in at all, as stated in the patent, is to increase the heat at the point of contact between the fuel and the material operated upon, and if a sufficient quantity of

the oxide is upon the surface of the material before it is put into the furnace, it will be in the required position and produce the same result.

Again:

They say that their process is different because they do not break up the material into small pieces. If they find the material to their hand in pieces sufficiently small for use, of course the necessity for breaking them up would be obviated; but, as the evidence shows, the material must certainly be broken up by some one before it can be removed from the trough of the blast furnace, where it is formed, or it could not be used in a cupola furnace at all, and they certainly cannot evade the patent because they happen to find the material in pieces sufficiently small to be used without further breaking.

Again:

They say that their process is different because they do not render the material granulous or spongy by passing air or water through it; but that forms no essential part of the process claimed in the patent, but is a mere suggestion, which may or may not be followed.

And the same remarks apply to the blowing in of material through the tuyeres to correct the bad effects of sulphur which may be in the iron, and which defendants say they do not use.

Much greater differences or variations from the processes described in Letters Patent than those which the defendants insist upon, have been held by the courts to be infringements of the patented process. Thus, in the case of Wetherill *et al. vs.* The New Jersey Zinc Company, reported in vol. 5, page 400, Patent Office Gazette.

A patent for making white oxide of zinc by spreading a bed of pulverized ore and pea coal evenly upon a thin bed of chestnut coal burning upon a grate, and forcing air through the grate and the mass above it, was held to be infringed by spreading upon a bed of the slag left in previous operations, and before the fire of the last is extinct, a bed of charcoal, a bed of pea coal, and a bed of finely crushed ore, dust, coal and marble, one bed upon the other as soon as it becomes ignited, and forcing air through the slag.

"To infringe a patent right, it is not necessary that the thing patented should be adopted in every particular; if the patent is adopted substantially by the defendants, they are guilty of infringement."

Root *vs.* Ball, 4 McLean, 180.

"An infringement consists in constructing a machine or making a compound *substantially* in the same mode as that for which the patent has been obtained."

Allen *vs.* Hunter, 6 McLean, 311.

"If the principle is worth anything, no mere evasion should be countenanced. Perfect identity is not required to demonstrate an infringement of principle."

Page *vs.* Ferry, 1 Fisher, 311.

See also Mowry *vs.* Whitney, 14 Wallace, 620.

It is admitted by the defendants that they use the same material described by Vinton, and it is also apparent from the evidence that they treat it in substantially the same way as described in the Vinton patent.

Infringement is proved beyond question.

The decree should be reversed, and the defendants restrained from further infringement of the patent, and ordered to account with complainants for the profits they have made.

ANDREW McCALLUM,
Counsel for Appellants.

November 25, 1881.

Circuit Court of the United States

FOR THE

NORTHERN DISTRICT OF OHIO.

JOHN J. VINTON, JOHN FISHER, WILLIAM McGILVRAY AND THOMAS E. BLOUNT,—*Complainants.*

VS.

HOMER HAMILTON, FREDERICK GERWIG, JOHN STAMBAUGH AND WILLIAM TOD, FIRM OF HOMER HAMILTON & CO.—*Defendants.*

IN EQUITY.

ARGUMENT FOR DEFENDANTS.

THOS. W. SANDERSON, Attorney for Defendants.

In the United States Circuit Court.

NORTHERN DISTRICT OF OHIO.

JOHN J. VINTON, ET ALS,
vs.
HOMER HAMILTON & CO. } In Equity.

Reply to Argument for Complainants.

The defendants having filed their brief in this suit prior to the argument of complainants counsel, and no brief of authorities intended to be cited on the part of complainants having been furnished to defendants' counsel, I deem it proper to file this additional brief, in reply to that filed by complainants' counsel.

I desire to correct some misapprehensions, or rather misstatements of the evidence, on the part of complainants' counsel, and

1. It is not claimed by defendants that there is any difference between the *material*, viz., *slag* and *refuse* of blast furnaces, specified in Vinton's patent, and the *material* used by defendants, except it may be, that Vinton's specifications would be held to include *all kinds* of *heavy slag*, in addition to the *runners*, so called. But I have no doubt, and in my argument have expressed none, that his specifications include *runners*, the material used by defendants; so that the Court need not take time to determine any issue made concerning this branch of the case.

or to Vinton's patent; and *second*, that the *process* and *method of use*, therein, and thereby, was precisely the same process and method described in Vinton's patent, and that he merely *substitutes* one machine (the cupola) for another, (the blast furnace) leaving the *process* the same. If these two things are established, it is certainly an end of the case. The learned counsel for complainants seems compelled, in view of this claim from the testimony, to grasp at, and rely solely upon the following facts or claims, viz: A *part* of Vinton's process is to cut a *cinder notch* in the cupola, in order to its use for the purpose specified in his claim; the fact that a certain *quality* of pig iron can be manufactured cheaper by means of the use of the cupola, according to his process, than by means of the blast furnace, and that defendants use the oxides of iron, because they use that which forms upon and adheres to the slag.

I shall briefly examine these claims,

First, with reference to the cinder notch. I said in my opening argument, that every blast furnace has a cinder notch in it for the *same purpose precisely* that Vinton makes one in the cupola, that is, to permit the molten cinder, which floats on the top of the iron to run off. That is shown by the evidence. It never has been, and never will be disputed. What is its significance? Clearly this, that a notch cut in a receptacle for melting iron, which when melted throws off molten cinder, has been in public use since iron was first manufactured; that such contrivance is old, and cannot be the subject of invention, in connection with any appliance used to melt iron, or iron ores. Vinton could have seen the same contrivance at any blast furnace, where slag was used, performing the same functions, and answering the same purpose. It is well known that oil

is gathered, by means of the same contrivance. The water and oil flows, or is pumped together into tanks, of various designs and patterns; the oil rises to, and floats on the surface of the water, and by means of a *notch* or *hole* cut in the side or end of the tank, the oil is allowed to gradually flow off into barrels, another tank, or into pipes, separated from the water. Now suppose that some one should conceive the idea that a tank of some peculiar construction, or some vessel that had never before been used in connection with the gathering of the oil, would be more useful for that purpose, than those in general use, and he should proceed to substitute such vessel, but could not, because it was an old contrivance, like the cupola, obtain a patent for its use, in connection with the gathering of oil, could he prevent its use, by cutting an *oil notch* in it, in the same manner that the oil notches are cut in the tanks in general use? The answer is obvious, that the mere substitution of a new vessel, in which to gather the oil, that had never been used for that purpose, would in the first place, be no part of any new *process* for gathering oil, and second, that the making of a notch in it, in order to permit the oil to freely pass from off the water, as in the old vessel, would not be new, or render the process patentable, because, oil notches had never been used before, in the uses to which the substituted vessel had been applied. Applying this illustration to the case in hand, we find from the evidence, as heretofore stated, that the old receptacle for melting slag, viz., blast furnaces, had cinder notches; that the new receptacles, (cupolas) substituted by Vinton are constructed for the purpose of their ordinary uses without that contrivance; and that in order to use them when substituted, it is necessary to construct in them the

cinder notch, in precisely the same way, for the same purpose, and with precisely the same result, as in the old receptacle, and that when that is done, each, and every step and element of the *process* and method is the same. Is this invention? I shall not submit such claim of *invention* to the test of *ridicule*, about which the learned counsel complains so much, but I must be pardoned, if I make one more illustration. Take the familiar example of a hook on the end of a chain. It is well known that iron chains had been used, with a hook on one end, for many years, for a great variety of purposes. But there was a time when no one knew of the use of a gold chain with a hook on the end of it, for the purpose of securing a watch in the pocket. Suppose that at such time, an *inventor* like Vinton, after considering the various uses of iron and gold chains had conceived that a gold chain could be constructed with a hook on one end of it to be hooked into the button-hole of the vest, and thus secure the watch of the wearer; could he have sustained a patent for this *new use* of the chain, on any such ridiculous claim, as that use of the chain for the same purpose, therefore, it had been used for the self-same purpose, but did not have the hook to it?

4. Another ground upon which it is still claimed the Vinton patent may be sustained, is that pig iron may be made *cheaper* by his process, conceding the process to be old, than by other means. The Court will see that the evidence establishes that pig iron of a *poor quality* can be made cheaper by the Vinton method, than pig iron of an ordinarily good quality can be made by means of the blast furnaces. It is left very clear by the evidence, that nothing could ultimately be gained by the manufacture of the low grade of iron by

means of the cupola, over the manufacture of ordinarily good iron by means of blast furnaces. But in answer to this claim, I said in the opening argument, that Vinton does not claim in his letters-patent, anything on this ground, and I believe that it is well settled that he cannot be protected on account of anything which he does not claim. See Wheeler vs. McCormick, 4 Off. Gazette 692. But how stands the proof as to any advantage in cheapness, over other methods? The learned counsel for complainants, assumes that because it requires about twenty-four hours for a charge in a blast furnace to go through, and obtain the iron from it; and that it requires only one-half an hour for the charge to pass through the cupola, into iron, that therefore iron can be made more cheaply in the latter. In the light of the evidence, this reasoning is specious. As I have said, in the first place, all the witnesses who testify upon the subject say, that *good pig iron* cannot be made by means of the cupola at all; and it cannot be affirmed, that *bad* pig iron can be cheap at any cost of manufacture. Charles Himrod says, "If you could melt the runners in the cupola for nothing, it would not be so economical, because the quality of the iron produced by the blast furnace would be so much better." There is no witness who testifies in support of the claim of comparative cheapness, who says anything more than *that poor pig iron can be made in a cupola from slag, cheaper than good pig iron can be made in a blast furnace.* But again, what has the length of time it requires for the charge to pass through the stack of a furnace to do with the *cost* of the iron made from slag by means of the furnace? The only point the learned counsel makes in this matter is, that more bad and unmerchantable pig iron can be made by the

my surprise at the *peculiarity* of the claim made, that the defendants have infringed that part of Vinton's process, which requires the use of scrap or oxide of iron, or black scale, as one of the elements of his process, by permitting the oxide which *naturally* formed on the slag to remain on it, when they placed the slag in the cupola. (See argument for complainants, page 32.) By referring to schedule, page 2, it will be seen that the specification is, "A bed of coke or other suitable fuel, is first placed in the cupola, *and on the top of the coke a small quantity of scrap, or other oxidized iron (preferably scale, or black oxide of iron) is sprinkled.*" The claim now made, after it has been conclusively shown that defendants entirely omitted that element in their operations, is, that if the *same material*, which Vinton's process was intended to operate upon, happens to contain any oxide of iron, that its use is an infringement of the patent, so far as that element is concerned. It seems to me, that such claim is too absurd to even invoke *ridicule*. It has been contended at great length, that the material operated upon by Vinton was the same as that from which the defendants manufactured iron, and the claim is admitted by defendants. Why, then, does Vinton use the oxidized iron? Or must the defendants in the use of the material, subject it to some process, to get rid of its *natural properties*, upon peril of infringing some patent? As well might Vinton claim that because his specifications embrace the use of *limestone*, the defendants should be enjoined from using that which is mixed with the iron in the slag, in the form of cinder.

6. The counsel complains because the defendants did not take the testimony of all the witnesses, whose names and residences are given in

the answer, concerning prior use, and says, "of the long array of witnesses set forth in the answer, only the following were brought forward to give evidenee in the case," (mentioning ten.) Argument for complainants, page 34.

I was not aware of any rule that required that *all* the witnesses named in the answer must be examined, and I feel assured that when the Court shall have examined the testimony of those called, that the defendants will be justified for not having added to the testimony, already somewhat voluminous, on all points.

In this case, as in all others of a like nature, the defendants are compelled to make their answer, to some extent, upon such information as they can procure, previous to the taking of the testimony; and in many instances, the testimony may not turn out as expected. So it was in the case of the witness Enwright, whose testimony is so energetically attacked by complainants' counsel. I never have claimed anything from his testimony, nor anything from that of the witness McFarland. I have not deemed it at all necessary, where there was so much evidence from men of undoubted truth, integrity and experience, to waste time on anything questionable.

7. One other matter I may be pardoned for noticing. The counsel for complainants, page 55 argument, says: "The testimony of N. B. Hatch which is objected to by complainants for the reason that no notice was given thereof in defendants' answer, is of the same category as that of McFarland."

The objection to the testimony of Hatch cannot be well taken, first, for the reason that an amendment to the answer was allowed by the Court, and filed, containing notice; and second, complainants' counsel was present and cross-examined him.

In the next paragraph of the argument, the learned counsel has misstated the testimony of Hatch. He says, "He (Hatch) alleges that he *experimented* with this material in a foundry cupola about the year 1856, but the furnace was abandoned and pulled down and disappeared, a year or two after it was built."

This is not the testimony of Hatch; but it is, that he and another were engaged in operating a blast furnace at the time stated, and that they set up and used for some two years or more, an ordinary foundry cupola, in connection with the furnace, to melt slag, and run the iron into castings and pig iron; that this use was not *experiment*, in order to determine anything, but an actual, practical application of the cupola, to the melting of slag. This use was open and notorious for years, and in such manner, as that every one who desired to do so, could see it, and the presumption is, that it was observed, and known.. I am aware that the testimony of Hatch is troublesome to complainants, and I am therefore not surprised that an effort is made to counteract its influence by the statement of counsel outside of the evidence, that "This man Hatch, claims to have made iron from *coal*, at a date prior to the use of that material in this country, so far as written records show." In reply I assert that the written records show, that iron was made by use of *raw coal* in the Mahoning Valley as early as 1846 by Wilkeson, Wilkes & Co., at Lowellville, in Mahoning county, Ohio; by David Himrod a year earlier, at Clay Furnace, in Mercer county, Pennsylvania. At the time mentioned by Hatch, raw coal was used at all the furnaces in Eastern Ohio and Western Pennsylvania; and a little examination of the written records of the iron manufacture in the Mahoning and Shenango Valleys,

would have shown the learned gentleman his grave error. I here extract from "Youngstown Past and Present," page 67, a book published in 1875, by Wiggins & McKillop, Cleveland and Pittsburgh. The same same facts will also be found in Wiggins' Directory, 1869, page 155:

"In July, 1845, Himrod & Vincent, of Mercer county, Pa., blew in the Clay Furnace, not many miles from the Ohio line, on the waters of the Shenango. About three months afterwards, in consequence of a short supply of charcoal, as stated by Mr. Davis, their founder, a portion of coke was used to charge the furnace. Their coal belongs to seam No. 1, the seam which is now used at Sharon and Youngstswn, in its raw state, variously known as "Free Burning Splint" or "Block Coal," and which never makes solid coke. A difficulty soon occurred with the cokers, and, as Mr. Himrod states, he conceived the plan of trying his coal without coking. The furnace continued to work well, and to produce a fair quality of metal.

At the same time Messrs. Wilkinson, Wilkes & Co. were building a furnace on the Mahoning, at Lowell, Mahoning county. Ohio, intended to use mineral coal from seam No. 1, of which they owned a mine near Lowell.

A sharp correspondence occurred in 1869 between the partisans of the Clay furnace and those of the Lowell furnace, as to their priority in the use of raw coal. The credit of making the first iron with raw bituminous or semi bituminous coal, in the United States, belongs to one of these firms. An account of the blowing in of the Lowell Furnace, on the 8th of August, 1846, may be seen in the TRUMBULL DEMOCRAT, of Warren, dated August 15th, 1846, where it is stated that to "these gentlemen (Wilkinson, Wilkes & Co.,) belongs the honor of being the FIRST PERSONS IN THE UNITED STATES, who have succeeded in putting a furnace in blast with RAW BITUMINOUS COAL." According to Mr. Wilkes, writing from Painesville, April 2d, 1869, this furnace was run with coke several months, but at what time it does not state. It is admitted that Mr. David Himrod, late of Youngstown, produced the FIRST METAL, with raw coal, about the close of the year 1845, and has continued to use it ever since."

Again it is said, "There is no mention of the furnace which he alleges he built in any printed history of iron manufactories of this country."

This is also not correct, and if not deemed out of place, I shall present to the Court, a mention of it. The furnace built and operated by Hatch is remembered by more than fifty men of this Valley still living.

8. The learned counsel on page 76, asks, "Was the nature and value of the material (slag) known to any one before the publication of Vinton's patent?" I answer, is it at all necessary that its *value* should have been known? I take it, that the actual value of the material has nothing to do with the patentability of a method for operating upon it. That its *nature* was well known, and the uses to which it could be put, is abundantly shown by the testimony of those who used it for the same purpose as Vinton for many years before. The rhetorical picture which the counsel draws on pages 76 and 77, as to the disposition of this material is a picture of "the long ago." The evidence conclusively shows that for many years prior to Vinton's patent no such disposition was made of the material; and while much of it might be found in the dumps of the furnaces managed by the eleven witnesses who have testified to knowledge, and use of it, the learned counsel seems to forget, that what can now be found, was put there long years ago, and previous to the time it came into general use. I have no reply to make to the attack upon the integrity of these witnesses, by the gentleman, in this connection, for they are too well known in this district, to be in any wise injured thereby. I am aware, however, that if their testimony is to be credited, the complainants' case fails, and can therefore readily excuse the motive which prompted the remarks.

9. I shall not trespass upon the time of the Court to reply further to the argument of coun-

sel as to the question of prior use, further than to request the Court to examine the case cited by him in 10 Howard 492, of Tayler et. al. vs. Wilder, and referring the Court to the testimony of Hatch, Paisley and the others, which demonstrates that from the time of the use by Hatch, down to the time of Vinton's patent, the use of the material in the same manner, for the same purpose, was never lost sight of, although it *might* have been unknown to Vinton.

Nor do I deem it necessary to say to the Court, that I place no reliance upon the testimony of Enwright, or of McFarland, and all the time and pains taken to get rid of, and contradict the testimony of Enwright might have been spared. Testimony in this class of cases, as the Court is well aware, is taken upon such information as parties or counsel, in the hurry of business may hear of, and it can scarcely be expected, that at the time of the preparation of an answer, all the witnesses that are believed to have information on the subject in controversy should have been interviewed, nor that all they might know, or not know, ascertained without taking their depositions. We think, however, that we have produced upon every branch of the defense, sufficient testimony of the most credible, and unimpeachable character, to sustain each, and therefore confidently submit the case.

THOS. W. SANDERSON,
Att'y for Defendants.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1130.

THE BANK OF COMMERCE, PLAINTIFF IN ERROR,

vs.

THE STATE OF TENNESSEE, THE COUNTY OF SHELBY, E. L. McGOWAN AND GEORGE B. FLEECE, COUNTY TRUSTEES, AND THE TAXING DISTRICT OF SHELBY COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED NOVEMBER 4, 1881.

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1 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State for the western division thereof, at Jackson, on the first Monday of April, A. D. 1881. Present, the Hon. Jas. W. Deaderick, chief justice, and Robert McFarland, Wm. F. Cooper, Thos. J. Freeman, and Peter Turner, judges, to-wit:

Be it remembered that heretofore, to wit, on the 2d day of June, A. D. 1881, a transcript of the record in the case of The Bank of Commerce against E. L. McGowan and George B. Fleece, county trustees, was filed in the office of the clerk of said supreme court, at Jackson, in the words and figures following:

2 Chancery court of Shelby county.

STATE OF TENNESSEE,
Shelby County, ss:

Pleas before the honorable W. W. McDowell, chancellor of the chancery court of Shelby County, held in Memphis, and State and county aforesaid, and at the April term thereof, 1881.

Be it remembered that heretofore, to wit, April 12th, 1881, The Bank of Commerce filed its bill of complaint against E. L. McGowan, trustee, &c., in the court aforesaid, in the words and figures following, viz:

To the honorable W. W. McDowell, chancellor of the chancery court of Shelby County, in the State of Tennessee:

3 THE BANK OF COMMERCE, A CORPORATION chartered by an act of the general assembly of the State of Tennessee, having its situs and place of business in Shelby County, Tenn., complainant,
vs.
E. L. MCGOWAN, TRUSTEE OF SHELBY COUNTY, Tennessee, defendant. } R. D., 3999.

The complainant, The Bank of Commerce, respectfully alleges to your honor that the general assembly of Tennessee, on the 29th day of February, 1856, passed a statute wherein and whereby they granted a charter and incorporated the complainant company by the name and style of the Chattanooga Savings Institution, and clothed it with
4 all franchises, powers, and privileges necessary and proper to its corporate existence, and essential to promote the legitimate objects and design of the corporation.

The fourth section provides, "That said institution may discount notes, buy and sell stock, deal in exchange, and gold and silver bullion, may purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell or exchange the same, and may hold such real and personal property and estate as may be conveyed to it to secure debts due the institution, and may sell and convey the same;" and is granted other powers not now necessary to be alleged. The third section provides, among other things, "That said institution shall pay to the
5 State an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes." Com-

plainant further shows that the 1st, 2nd, 3rd, & 4th sections of said act, ch. 128, of the acts of 1856, p. , create and endow the Gayoso Savings Institution with the powers, privileges, immunities hereinbefore alleged, while the 6th section creates the complainant by the name of the "Chattanooga Savings Institution," and also enacts "that it is hereby invested with all the powers, privileges, rights, and immunities, and subject to the same liabilities and restrictions that are given and imposed in the foregoing sections upon the Gayoso Savings In-
6 stitution," and locating complainant at Chattanooga. By the act of November 15th, 1859, the Chattanooga Savings Institution was authorized to move their office to Memphis. By the act of February 12th, 1866, the name of complainant was changed to "The Savings Bank of Memphis." By the act of March 12th, 1873, the name was again changed to that of "The Bank of Commerce." After the passage of the original act the company was duly organized, with proper subscriptions of stock, and commenced and continued the exercise and enjoyment of its franchises, as complainant is informed, in Chattanooga, until the removal under the amendment aforesaid to Memphis,
7 and here, as complainant is informed, under the name of the Savings Bank of Memphis, it continued the exercise of its franchises down to the 12th day of March, 1873. From this last date it has been operated under the last charter name of the Bank of Commerce. The stock subscriptions actually taken amount to $200,000.00, every dollar of which has been paid, so that the cash capital stock of complainant company does now and has for years amounted to full two hundred thousand dollars. Complainant further avers and alleges that compl't, The Bank of Commerce, has regularly and annually paid to the State of Tennessee an annual tax of one-half of one per cent.
8 on each share of its capital stock of $200,000.00, in compliance with and in express obedience to the requirement of the last clause of the third section of its charter, and the State has annually and regularly received and accepted said tax in express accordance with and assertion of the liability of the bank, and of the right of the State under the provisions of said third section, the former to pay and the latter to accept payment of said annual tax in lieu of all other taxation. Compl't would further show your honor that, on the first day of January, 1880, and up to the present time, complainant was the owner in fee simple absolute of a lot of land in the city of Memphis, county of Shelby and State of Tennessee, being lot No. (86)
9 eighty-six, at the intersection of the north side of Madison street with the west side of the alley between Main st. and Front Row.

This lot has a front of 24¾ feet on the north side of Madison street, commencing at the alley between Main street and Front Row, with a depth northward of seventy-four (74) feet.

Compl't alleges that in the assertion and exercise solely of the privilege, franchise, and authority conferred on complainant by the second clause of the fourth section of the charter providing that compl't "may purchase and hold a lot of ground for the use of 'the institution
10 as a place of business,'" it did buy with a part of its capital stock said lot of 24¾ feet front on Madison street by 74 feet deep, with the building and improvements thereon, solely for the use of the bank as a place of business, and has used it continuously for that purpose ever since its purchase, compl't having occupied said building for its legitimate banking business, and for none other.

It is true that as the bank has not yet required the use of the cellar,

the second and third stories of the building for its own banking purposes, compl't has heretofore, and does now, temporarily let out the different rooms in the cellar and in the second and third stories for
11 a money rent, and will continue to do so until compl't shall require the use of those rooms for its own banking purposes; but compl't alleges that the sole and single purpose of compl't in purchasing said lot with the improvements thereon was to obtain a place of business for the use of the institution, and it has been continuously so held up to the present moment. As above averred, the lot has only a front of 24¾ feet and a depth of 74 feet, affording in the full capacity of the building on the first floor only room enough for the officers and employees of the bank in the discharge of their ordinary duties and for the vaults, safes, and other essential furniture of the bank.

12 Compl't further alleges that on the 1st day of January, 1880, and continuously from that day to the present, compl't has been the owner in fee-simple of three other lots of land, situate in the city of Memphis, county of Shelby, and State of Tennessee, bounded and described as follows, to wit: Lot (9) nine, block (47) forty-seven, having a front on the west side of De Soto street, between Pontotoc and Vance, of (75) seventy-five feet by a depth of (180) one hundred and eighty feet westward, worth, as estimated in the accompanying tax-bill, at $2,300. Also lot No. (3) three, block (47) forty-seven, having a front on the east side of Hernando st. at the northeast corner of Pontotoc and
13 Hernando, of (62) sixty-two feet by (209) two hundred and nine feet deep on the north side of Pontotoc street, worth, as estimated in the accompanying tax-bill, about $1,400.00. Also lot No. (12) twelve, block (44) forty-four, having a front on the east side of Hernando street, at the northeast corner of Pontotoc and Hernando streets, of (75) seventy-five feet by (150) one hundred and fifty westward on the north side of Pontotoc street, worth, as estimated in the accompanying tax-bill, at $2,200.00.

All three of the above lots were conveyed by Jesse Moore, now deceased, formerly a member of the firm of Moore, Emery & Co.,
14 by a deed of trust to R. A. Parker, trustee, to secure loans made to Moore, Emery & Co. by complainant, to the amount of $20,000.00, and the obligors failing to pay the full amount of the debt by something over $11,000.00, the three lots were sold under the deed of trust and bought by compl't, to save a part of the debt. Compl't made the purchase under this deed of trust solely to save a part of their debt, and even then lost several thousand dollars. Compl't now only holds the property for sale and will make sale forthwith to restore so much of its capital of *of* the legitimate channel and course of its business of banking. Compl't alleges that the money invested by it in these
15 three lots, constitutes a part of its capital and became so invested solely in the mode and for the purpose above set forth. Compl't avers that neither of the four lots is subject to any taxation, either by the State or the county, so long as owned by compl't as hereinbefore shown, being and representing a part of its capital fairly and truly invested in accordance with the terms of the charter.

But, notwithstanding the premises the following taxes have been assessed against and levied on all of said lots for the years 1879, 1880, and 1881, by the State of Tennessee and by the county of Shelby, in violation of the charter contract of complainant, made with the State of Tennessee.

16 The State has made the following assessments:

STATE OF TENNESSEE
vs
BANK OF COMMERCE.

For taxing district, 1879:

Lot 86, 24½ feet by 74 N. S. Madison	$22,500 00
Tax	$258 75

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To taxing district for taxes, 1880:

Lot 86, 24½ ft. by 74, Madison st	$24,000 00
Special sewerage tax, due Dec. 1, $1.00 on $100	$240 00
Same for 1881	$384 00

Also the following:

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To taxing district, taxes for 1880:

Lot 9 bl'k 47, 75 x 180 ft., D. Soto st., W. side, value	$2,300 00
" 3 " " 65 x 209 " Hernando " E. " "	1,400 00
" 12 " 44, 75 x 150 " " " W. side	2,000 00
Total valuation	5,700 00
17 Special sewerage tax due Dec. 1st, '80, $1.00 on $100.00	$57 00
Also on same lots, tax for taxing district	$94 40

Also the following:

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To State and county taxes for 1880:

Lot No. 86, 24½ x 74 ft., Madison street, W. side, between Main & Front Row. Total	$180 00

Also the following:

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To State and county taxes for 1880.

Lot 9, bl'k 47, 75 x 180 ft., W. side De Soto street between Pontotoc & Vance, value	$2,300 00
" 3, " 47, 62 x 209, " E. side Hernando NE. corner Pontotoc	$1,400 00
" 12, " 44, 75 x 150 ft., W. side Hernando NW. cor. Pontotoc	$2,200 00
Total value	$5,900 00
Total tax, State & county	$44 25

18 The several bills for these different taxes are hereto attached as Exhibits B, C, D, E, F, G, & H, with the protests and receipts endorsed thereon and are filed with this bill, and are prayed to

be taken with the receipts and endorsements thereon as a part of this bill. Compl't alleges that the def't as trustee of the State and tax collector have forcibly and compulsorily collected all of said tax-bill in money off of comp't by distress warrants, and have compelled comp't, under writs of execution, to pay every dollar of said taxes, and comp't, under compulsion & under a written protest endorsed on each of said bills paid, the same as alleged, wrongful and in violation of the charter, contract, and exemption of complainant. Said taxes
19 were all levied and assessed and collected in violation of its charter and charter contract and violates and impairs the obligation of the same.

The def'ts now hold said funds subject to the issue of this suit and the final order of this court in this cause. Compl't further avers that compl't has not heretofore sold lots Nos. (3) three and (12) twelve, because of the prostrate condition of the value of Memphis real estate and their total inability to find a purchaser, and compl't desires and will sell said lots at the earliest time possible. Compl't further alleges that the part of the lot and building No. 87 fronting 24⅓ feet on the north side of Madison street occupied and used by compl't for
20 the purpose of the bank is strictly and fairly (¾) three-fourths of the assessed values fixed in the bills Exhibits B, C, D, E, F, G, and H, and complainant claims that under no construction of its charter exemption is this ¾ interest subject to this taxation or to any taxation whatever. The premises considered compl't prays that said def'ts McGowan and Fleece be made def'ts to this bill and required to answer, and that on final hearing compl't have decree for said illegal taxes so paid against defendants respectively, and a perpetual injunction against future levies and assessments of such taxes under the statutes and for general relief, &c. This is the first ap-
21 plication for an injunction in this case.

HUMES AND POSTON,
Sol's for Compl't.

EXHIBIT A.—*Charter.*

SECTION 1. Be it enacted by the general assembly of the State of Tennessee, That Jesse E. Maxwell, A. D. Witherspoon, A. J. White, William E. Milton, and Gabriel Smither, and their associates and successors, be, and they are hereby created a body politic and corporate, by the name and style of the Gayoso Savings Institution, and by that name shall have succession, sue and be sued, plead and be impleaded, and generally to do every act and thing necessary to
22 carry out the provisions of this act, and promote the object and design of this corporation.

SEC. 2. Be it further enacted, That the capital stock of said company shall be divided into shares of fifty dollars each; and when two hundred shares shall have been subscribed, and the sum of one dollar per share paid thereon, the stockholders may meet and elect five directors, who shall serve one year, and until their successors shall be elected and enter upon the performance of their duties; and said directors shall elect one of their number to be president during their term of office.

SEC. 3. Be it further enacted, That said president and directors shall and may adopt and use a common seal, and alter the same
23 at pleasure, may make and adopt proper and necessary by-laws for their government; may appoint all necessary officers and agents, fix their compensation, and take bond and security for the faithful discharge of their duties; they may prescribe the manner of paying

in the stock and of the transfer thereof. Said institution shall have a lien on the stock for debts due it by the stockholders, before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes.

SEC. 4. Be it further enacted, That said institution may discount notes, buy and sell stock, deal in exchange, and gold and
24 silver bullion; may purchase and hold a lot of ground for the use of the institution, as a place of business, and at pleasure sell or exchange the same; and may hold such real or personal property and estate as may be conveyed to it to secure debts due the institution, and may sell and convey the same; it may receive on deposit any and all sums, not less than one dollar per week offered as stock deposits; and infants and femes-covert may deposit therein and control the deposits so made, which shall be for their own separate use, free from other contracts or control whatever; and when such deposits shall amount to fifty dollars, it may, at the option of the depositor, be-
25 come stock in the institution; it may receive other general or special deposits, and allow such interest thereon as may be agreed upon, not exceeding that allowed by law; and twice per year declare and pay to stockholders a dividend of profits. But said institution is hereby expressly prohibited from issueing notes, certificates, or other paper for the purpose of being used, or which shall have a tendency to pass and be used as a circulating medium.

SEC. 5. Be it further enacted, That the president and directors shall annually appoint the time and place of holding the election of their successors, and two or more of their number shall attend and conduct said election, each share being entitled to one vote.

SEC. 6. Be it further enacted, That this shall be in full force from and after the date of its passage.

26 Passed February 29, 1856.

NEILL S. BROWN,
Speaker of the House of Representatives.
EDWARD S. CHEATHAM,
Speaker of the Senate.

An act to incorporate the Gayoso Savings Institution and the Chattanooga Savings Institution.

* * * * * * *
* * * * * * *

SEC. 6. Be it further enacted, That Benjamin Chandler, Samuel R. McCamy, James Whiteside, John L. M. French, Edwin Marsh, and James C. Warner, their associates and successors be, and they are hereby, created a body politic and corporate, by the name and style of the Chattanooga Savings Institution, and by that name shall have
27 succession, sue and be sued, plead and be impleaded; and they are hereby invested with all the powers, privileges, rights, and immunities, and subjected to the same liabilities and restrictions that are given and imposed in the foregoing sections upon the Gayoso Savings Institution. The corporation chartered by this section shall be located in the city of Chattanooga.

* * * * * * *

Passed February 29, 1856.

NEILL S. BROWN,
Speaker of the House of Representatives.
EDWARD S. CHEATHAM,
Speaker of the Senate.

An act to authorize the Chattanooga Savings Institution to remove their office to Memphis, Tennessee.

28 SECTION 1. Be it enacted by the general assembly of the State of Tennessee, that the Chattanooga Savings Institution be, and they are hereby, authorized to remove their office to Memphis, Tennessee.

Passed November 15, 1859.

W. C. WHITTHORNE,
Speaker of the House of Representatives.
TAZ. W. NEWMAN,
Speaker of the Senate.

An act to amend an act to authorize the Chattanooga Savings Institution to remove their office to Memphis, Tennessee, passed November 15, 1859.

SECTION 1. Be it enacted by the general assembly of the State of Tennessee, that an act to authorize the Chattanooga Savings Institution to remove their office to Memphis, Tennessee, passed Nov. 15, 1859, be so amended as to change the name from the "Chattanooga
29 Savings Institution" to "The Savings Bank of Memphis," and that this act take effect from and after its passage.

Passed February 12, 1866.

WM. HEISKELL,
Speaker of the House of Representative.
JOSHUA B. FRIERSON,
Speaker of the Senate.

An act to amend an act changing the name of the Chattanooga Savings Institution to the Savings Bank of Memphis.

SECTION 1. Be it enacted by the general assembly of the State of Tennessee, that the act of this general assembly, passed February 12, 1866, be so amended as to change the name of "Savings Bank of Memphis," to the "Bank of Commerce," and that this act take effect
30 from and after its passage, the public welfare requiring the same.

Passed March 12, 1873.

W. S. McGAUGHEY,
Speaker of the House of Representatives.
A. T. LACEY,
Speaker of the Senate.

Ward 3, folio 105. Memphis, May 30, '81.

STATE OF TENNESSEE }
vs.
BANK OF COMMERCE. }

To taxing district taxes for 1879:
Lot 86, 24½ x 74, north side Madison st., value..... $22,500

Rate of taxes:

Fire	dep't	20	c'ts	on	$100.
Police	"	"	"	"	"
Lighting	"	10	"	"	"
Public schools	"	"	"	"	"

Repairing paving, &c., 50 c'ts on $100.
Hospital 5 " " "
Total tax, $1.15 on $100 ..... $258 75

Received payment,

G. B. FLEECE, *Trustee.*
G. R. POWELL, *Deputy.*

Correct copy:

G. B. FLEECE, *Trustee.*

31 The following endorsement on the face of said bill appears:

"This tax bill, amounting to $258.75, was this day paid to me by the Bank of Commerce under protest. Said bank claims to be exempt from all taxes, it having paid the ½ of one per cent. to the State, and claiming immunity and exemption under the charter from all other taxation; and I received it under this protest, May 30, 1881.

"G. B. FLEECE, *Tr.*
"G. R. POWELL, *D. Tr.*"

Dist. No. 5, Ward No. 3, folio 90. Memphis, May 30th, 1881.

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To State and county taxes for 1880:

Lot 86, 24¾ x 74, Madison st., N. side, bet. Main & Front, value	$24,000 00
Rate of tax:	
10 State	24 00
32 30 county	48 00
10 judgments	24 00
5 M. & O. R. R. coupon tax	12 00
20 school	72 00
Total 75 c'ts on $100	$180 00

Received payment,

E. L. McGOWAN, *Trustee.*

Correct copy:

E. L. McGOWAN, *Trustee.*

On the face of which appears:

"This bill for taxes is paid by the Bank of Commerce under protest. Said bank having paid one-half of one per cent. as required by its charter, it claims exemption from all further taxation and protests against the collection of this bill as unlawful, invalid, and without any authority for its enforcement, and, subject to this protest makes the payment.

"E. L. McGOWAN,
"*County Trustee.*

33 Dist. 14, ward No. 5, folio 46. Memphis, May 30, 1881.

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To State and county taxes for 1880:

Lot 9 block 47, 75 x 180, W. S. De Soto, bet. Pontotoc & Vance, value	$2,300
" 3 " 47, 62 x 209, E. S. Hernando, NE. cor. Pontotoc	$1,400
" 12 " 44, 75 x 150, W. S. Hernando, NW. cor. "	$2,200
Total value	$5,900

Rate of tax:

10 State	$5 90
30 county	17 70
10 judgments	5 90
5 M. & O. R. R. coupon tax	2 95
20 school	11 80
Total, 75 cts. on $100	$44 25

Received payment,

E. L. McGOWAN, *Tr.*

Correct copy:

E. L. McGOWAN, *Trustee.*

On the face of which appears:

This tax-bill is paid under protest by the Bank of Commerce,
34 it claiming that it has a contract with the State of Tennessee by its charter to pay one-half of one per cent., which shall be in lieu of all other taxes, and this bill is, without any authority, is illegal, oppressive, and violates the express exemption of its charter, and it pays the same to me under protest, and I so receive it.

E. L. McGOWAN,
County Trustee.

Dist. No. 5, ward No. 3, page 7. Shelby County, Tenn., May 30, 1881.

STATE OF TENNESSEE }
vs.
BANK OF COMMERCE. }

To taxing district for taxes, 1881:

Lot 86, 24¼ x 74, Madison st., N. side, value	$24,000 00
Police department, 25c. on $100	$60
Fire " " " 12 "	60
Lighting " " " " "	28 80
35 Public schools, 15 cts. on $100	36
Streets, sanitary, & bridges, 78 cts. on $100	187 20
Hospital, 5 cts. " "	12
Total property tax, $1.60 on $10.	
Total tax	$384 00

Received payment.

E. L. McGOWAN,
County Trustee.

A true copy:

E. L. McGOWAN,
County Trustee.

On the face of which appears:

This tax bill is paid under protest by the Bank of Commerce, it claiming exemption under its charter from further or other taxation, having paid to the State ½ of one per cent. fixed by its charter, and this payment to me is under protest, and I so receive the amount thereof.

E. L. McGOWAN,
County Trustee.

36 Dist. No. 14, ward No. 5, page 4. Shelby County, Tenn., May 30, 1881.

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To taxing district taxes for 1881:

Lot 9, block 47, 75 x 180, W. S. De Soto, bet. Pontotoc & Vance, value		$2,300
3, 47, 62 x 209, E. side Hernando		1,400
12, 44, 75 x 150, W. " "		2,200
Total valuation		$5,900
Police department, 25c. on $100		$14 75
Fire " " " "		14 75
Lighting " 12c. " "		7 08
Public schools, 15c. " "		8 85
Streets, sanitary, & bridges, 78c. on $100		46 02
Hospital, 5c. " "		2 95
Total property tax, $1.60 on $100		$94 40

Received payment,

E. L. McGOWAN,
County Trustee.

A true copy:

E. L. McGOWAN,
County Trustee.

On the face of which appears:

This bill for taxes is paid under protest by the Bank of Com-
37 merce, who claims that by virtue of its having paid to the State one-half of one per cent., as fixed by the charter, that it is not liable to further taxation, and claims such exemption. It having paid its charter rate, it is paid by it under protest.

May 30, 1881.

E. L. McGOWAN,
County Trustee.

Dist. No. 5, ward No. 3, p. 41. Shelby County; Tenn. May 30, 1881.

STATE OF TENNESSEE
vs.
BANK OF COMMERCE.

To taxing district for taxes, 1880:

Lot 86, 24¾ x 74, Madison st., value		$24,000 00
Special sewerage tax, due Dec. 1, 1880, $1.00 on $1.00		240
Coms.,		9 60
		$240 60

Received payment.

E. L. McGOWAN, *Co. Trustee.*

A true copy:

E. L. McGOWAN, *Co. Trustee.*

38 On face of which appears:

This tax-bill, amounting to $249.60, was this day paid to me under the protest by the Bank of Commerce, said bank claiming to be exempt from all other taxation, having paid the ½ of one per cent under its charter to the State, and it makes this payment to me, and I receive it from it under its protest and ascertion of exemption therefrom.

E. L. McGOWAN,
County Trustee.

District No. 14, ward No. 5, page 23. Shelby County, Tenn., May 30, 1881.

STATE OF TENNESSEE }
vs.
BANK OF COMMERCE. }

To taxing district for taxes, 1880:

Lot 9, block 4, 75 x 180, De Soto. W. side, value		$2,300
3,	47, 62 x 209, Hernando, E. side	1,400
12,	44, 75 x 150, " W. "	2,000
Total valuation		$5,700
39 Special sewerage tax, due Dec. 1, 1880, $1.00 on $100		57 00
Com's		2 30
		$59 30

Received payment.

E. L. McGOWAN,
County Trustee.

A true copy:

E. L. McGOWAN,
County Trustee.

On the face of which appears:

"This bill is paid by the Bank of Commerce under protest, it claiming that the tax of one-half of one per cent. as fixed by its charter having been paid to the State that it is liable to no further taxation, and protests that this tax is invalid, and without authority, and I receive from it the tax under their express protest, it having been so paid to me this day.

May 30th, 1881.

E. L. McGOWAN,
County Trustee.

40 *Cost Bond.—Penalty* $250.00.

(Signed) THE BANK OF COMMERCE,
Per HUMES & POSTON, *Atty's.*
W. Y. C. HUMES, *S'ty.*

Demurrer of defendants.—Filed June 1, 1881.—R. J. BLACK, C. & M.

THE BANK OF COMMERCE }
vs. } R. 3999.
E. L. McGOWAN, TRUSTEE. }

The defendants George B. Fleece and E. L. McGowan, by protestation, not confessing, &c., the allegations in said bill contained doth demur thereto & assign—

I. Because it appears in and by said bill that all of said real estate is

not in the exclusive occupation of complainant for the purposes of conducting its business.

41 Wherefore, &c., this defendant prays the judgment of the court.

TAYLOR & CARROLL,
Sol's for Def't.
C. W. HEISKELL,
For Taxing District.

II. It affirmatively appears on the face of the bill that all of the property outside of the building where the banking business is carried on, and that of that building the basement and the third and fourth stories are not used for the business of banking, but are rented out for a money rent, and that only one story thereof is used in said banking business.

C. W. HEISKELL,
Att'y for T. Dist.

42 *Decree on demurrer, &c.—Ent. June* 1, 1881. (M. B. 31, p. 477.)

THE BANK OF COMMERCE
vs.
E. L. MCGOWAN, TRUSTEE, ET AL.

Before Hon'l Thos. D. Eldridge, judge, &c., sitting by interchange with the Hon. W. W. McDowell, chancellor, in this cause, by leave of the court, complainant is allowed to amend its bill herein by making Geo. B. Fleece, county trustee, a party, and by substituting different averments and asking different relief; and thereupon it withdraws, by leave of the court and defendants, the original bill, and substitutes a new one, and thereupon defendants are allowed to substitute a
43 new demurrer, and withdraws the one originally filed, which is accordingly done; and thereupon the cause coming on to be heard upon the pleadings thus amended, and same being considered, said demurrer is adjudged to be good, and said bill is by the court dismissed; from which dismissal compl't prays, and the court grants, an appeal to the present term of the supreme court, sitting at Jackson, upon a bond for costs being given. By agreement a printed copy of the charter may be used in the transcript in lieu of a manuscript copy.

Appeal bond.

We, The Bank of Commerce, appellant, and surety, S. H. Dunscomb, acknowledge ourselves indebted to E. L. McGowan et al.,
44 appellees, in the sum of two hundred and fifty dollars.

To be void if the said Bank of Commerce above named, as appellant, who have prayed for and obtained an appeal from a decree of the chancery court of Shelby County in a cause in which Bank of Commerce is complainant and E. L. McGowan et al. are defendants, to the present term of the supreme court of Tennessee for the district of West Tennessee, to be held at Jackson, on the first Monday in April, 1881, shall pay all such costs as shall be awarded against them by said supreme court.

BANK OF COMMERCE, [SEAL]
Per HUMES & POSTON, *Att'ys.*
S. H. DUNSCOMB, [SEAL.]

45 *Agreement.*

BANK OF COMMERCE
vs.
E. L. MCGOWAN.

In this cause it is agreed, in order to save expense of proof, that the portion of the bank property actually used for banking purposes is worth, and shall be valued at fifteen thousand dollars.

The other portion not used in the business of the bank is worth, and shall be valued at nine thousand dollars.

June 8th, 1881.

HUMES & POSTON,
For Bank Commerce.
C. W. HEISKELL,
Att'y for Taxing District.
JULIUS A. TAYLOR,
Att'y for Shelby Co.

46 In the supreme court.

Opinion.

BANK OF COMMERCE
vs.
MCGOWAN.

SYLLABUS.

The charter of a bank, provided that it "shall pay to the State an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes," and also that the bank "may purchase and hold a lot of ground, for the use of the institution as a place of business, and at pleasure sell or exchange the same, and may hold such real and personal property and estate as may be conveyed to it, to secure debts due to it, and may sell and convey
47 the same." The bank bought a lot and improved it for a place of business, but used only one floor for this purpose, renting the cellar, and the second and third stories to other parties. It also bought at a trust sale, under a conveyance made by one of its debtors to a trustee to secure debts due to it, three lots in satisfaction of so much of its debt. Held, that the realty held and used as a place of business was exempt from taxation to the extent of the assessed value of that part so used, but that the residue of the assessed value of that realty, and the three lots bought in satisfaction of debt due it, were subject to taxation like other similar property.

48 OPINION.

BANK OF COMMERCE
vs.
E. L. MCGOWAN.

The charter of the Bank of Commerce provides that it "shall pay to the State an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes." The

charter further provides that the bank "may purchase and hold a lot of ground, for the use of the institution as a place of business, and at pleasure sell or exchange the same, and may hold such real and personal property and estate as may be conveyed to it to secure debts due to it, and may sell and convey the same." The bank has bought with a part of its capital stock, and owns a lot in the city of
49 Memphis which, with the improvements thereon, it purchased solely as a place of business, but only uses the first floor for that purpose, letting the cellar and the second and third stories to other parties for a money rent. It has also become the owner in fee of three other lots in the city of Memphis, which it has continuously held since the first of Jan'y, 1880. These lots were conveyed by a debtor of the bank to a trustee to secure certain loans due to the bank, and were, at the sale under the trust deed, bought by the bank. The purchase was made solely to save a part of the debt, and the lots are held for sale, and will be sold as soon as a reasonable price can be obtained, to
50 return so much of the bank's capital to its proper channel of business. The banking-house and the other three lots have been assessed for State and county taxes. The bank has paid the taxes under protest, and filed this bill to recover the money. The chancellor sustained a demurrer to the bill, and the complainant appealed.

The same question of the liability of a banking-house to taxation under similar provisions in the bank charter has already been before this court, and it was held that the exemption from taxation other than the specific tax prescribed only extended to so much of the building
51 as was necessary for the use of the bank, and actually so used. Any part of the building used for other purposes would be subject to taxation. (De Soto Bank vs. City of Memphis; 6 Baxt., 415.) The reason assigned was that the power to hold real estate is limited by the charter to the specific purpose, and cannot be extended beyond the terms of the grant. It may be added that the exemption from taxation of the corporate property, except to the extent prescribed, was in consideration of the use of the corporate capital for the purposes of the incorporation, and the contract ceased to operate when taxable property was held for any other purpose.

There is nothing in conflict with this view, as the learned
52 counsel of the complainant seems to think, in the decision of the Supreme Court of the United States in Farrington v. Tennessee, 95 U. S., 679. It was there held that the provision in a bank charter, like the one before us, is a contract, and will protect the shares of the stockholders from additional taxation. We recognize the controlling authority of that court in such cases, and yield to its decisions. The provision in question will, therefore, protect the capital stock, and the shares of the stockholders from any taxation beyond that prescribed in the charter. It may be conceded also, as a general rule, that taxation of the capital stock of a corporation may protect its property in which
53 the capital may be invested, and that taxation of the property may protect the capital stock. For the capital stock is usually the representative of the property of the corporation, and the property the representative of the capital stock. (Hannibal, etc. R. Co. vs. Shacklett, 30 Mo., 558.) If, under such circumstances, the stock and the property are both taxed, the taxation would be double. But the property may far exceed in value the capital stock, or the corporation may become the owner of property outside of the purposes of its incorporation. In the latter case, the authorities agree that property beyond the legitimate wants of a corporation for its corporate purposes

54 is not within an exemption of all property from taxation. (Wilmington R. Co. v. Reid, 13 Wall., 268; State v. Newark, 1 Dutch., 315; State v. Mansfield, 3 Zab., 510; Vermont Central R. Co. v. Burlington, 28 Verm, 193.)

It may be conceded, therefore, in accordance with the authorities cited and relied on by the learned counsel of the complainant, that a contract by charter for the payment of a particular tax, which shall be in lieu of all other taxes, will protect the capital stock of the corporation, and all the property in which that capital stock may be lawfully invested for the purposes of the incorporation, from any additional taxation.

But as we have seen an exemption from taxation, and for the
55 same reason, a limited exemption, will not exempt property beyond the legitimate wants of the corporation for the purposes of its incorporation. And, clearly, such exemption would not protect property which the corporation is without authority to hold. If it were otherwise, the corporation might abandon the purposes for which it was created, and invest its capital in property, and extend the immunity conceded for a specific object to the exemption of that property from the common burden of government. The authorities relied on cover cases in which property was legally bought and held for corporate
56 purposes. No case has been produced, and perhaps none can be, where the property was not necessary for the purposes of the incorporation, and not authorized to be held by the corporation.

We see no reason for departing from the rule laid down in the case of the De Soto Bank v. City of Memphis. In that view the realty was exempt from taxation to the extent of the part actually used for the purposes of the banking corporation, and subject to taxation for the residue of its taxable value. The assessment seems to have been on the whole property, and the complainant may be in fault in not having applied to the proper authorities for the proper deduction. It is also in fault in not having offered in its bill to submit
57 to so much of the burden as it was legally liable to pay. (German National Bank v. Kimball, 23 Alb. L. J., 369, a decision of the Sup. C'rt of the United States.) The suit is, however, to recover the taxes paid, and equity will be attained by limiting the relief, on final hearing, to the tax on that part of the assessment which represents the taxable value of so much of the realty as is held and used as a place of business by the bank.

The other realty assessed for taxation was, as the bill shows, bought by the bank at a sale made by the trustee of one of its debtors under a deed of trust or assignment for the benefit of creditors. By the purchase the realty ceased to be trust assets, and became the
58 absolute property of the complainant, and the complainant is holding it in order to secure an advantageous sale. The provision of the charter is that the corporation "may hold such real and personal property and estate as may be conveyed to it to secure debts due to it, and may sell and convey the same." But the realty in question was not conveyed to the bank "to secure debts due to it." It was conveyed in satisfaction of debts to the extent of the bid made at the sale. It is clearly not within the language of the charter, nor do we think it within its spirit or intent. The object was to enable the bank to take title to land as a security for debt, not to invest its capi-
59 tal in land either for a longer or a shorter period. Land held as security would be subject to taxation, for it would not be a part of the capital stock of the bank. Land held in the bank's own right

would be subject to taxation also, unless held "for the use of the institution as a place of business."

The chancellor's decree will be reversed, the demurrer overruled, and the cause remanded for an answer and further proceedings, unless, indeed, the parties choose to agree upon a final decree in accordance with this opinion. Each party will pay one half of the costs of this court.

COOPER, *J.*

60 *Decree.—Entered June 9th*, 1881.

BANK OF COMMERCE
v.
E. L. McGOWAN AND GEORGE B. FLEECE, county trustee'. } 816. Shelby ch'y docket.

This cause was this day heard upon the transcript of the record from the chancery court of Shelby County, and the same being fully understood, this court adjudges and decrees that in the decree of said chancery court there is manifest error, and it reverses said decree, and orders and decrees that said complainant was entitled to an exemption from taxation of so much of the building and lot as is used by said bank in its business, and that all the balance of the
61 premises not so used was liable to taxation. And it being agreed and admitted in open court that $\frac{1}{24}$ of the property was so used for banking purposes and $\frac{9}{24}$ thereof rented out; the court therefore orders and decrees that $\frac{1}{24}$ of the tax was improperly collected from complainant, and that complainant paying the same under protest is entitled to recover the same of defendants. And it appearing from said tax bills so paid that $258.75 was paid to defendant, George B. Fleece, trustee of Shelby County, and that complainant is entitled to recover back of said Fleece $\frac{1}{24}$ thereof, amounting to $161.70, with interest thereon from May 3rd, 1881, the date of said payment the
62 same is accordingly ordered, and that complainant is in like manner and to the same extent entitled to recover back in like proportion the taxes paid to defendant, E. L. McGowan, trustee for Shelby County, the same being as follows: State and county taxes for 1880, $180.00; taxing district taxes for 1880, $249.60; taxing district taxes for 1881, $384.00; $\frac{1}{24}$ of which is the sum of $508.50; and that said complainant have and recover of said McGowan, trustee as aforesaid, said sum of $508.50, with interest from May 30th, 1881.

As to the taxes paid on the balance of the lots taken by the bank for debt, the court sustains the decree below so far as it refused to
63 allow complainant to recover back these sums, the court holding such property not exempt in the hands of the bank from the general burdens of taxation. Defendants will pay the costs of this cause in this court and the court below for which and the decrees given complainant execution may issue.

From so much of the decree as refuses the bank total exemption from all taxes on its bank building and the other property taken by it for debt, complainant prays, and there is granted him, a writ of error to the next term of the Supreme Court of the United States at Washington, upon it giving bond and security, conditioned as by law required, in the penalty of $500.00.

64 *Petition for writ of error.*

To the Hon. Jas. W. Deadrick, chief justice of the supreme court of Tennessee:

The petition of the Bank of Commerce against E. L. McGowan and Geo. B. Fleece, county trustee', who are by law made the collectors of State, county, and city taxes for and within the county of Shelby, in the State of Tennessee.

Petitioner respectfully represents unto your honor, that lately in the supreme court of Tennessee, there was pending a cause wherein petitioner was complainant and E. L. McGowan and others were defendants,
in which a final decree was rendered in said supreme court at the
65 April term, 1881, against complainant (petitioner) in favor of the said defendants in said cause.

Petitioner further represents unto your honor that in the said cause and proceeding there was drawn in question one of the matters described in the 25th section of the judiciary act of the United States, and in the 709 section of the Revised Statutes of the United States, viz, the construction of sec. 10 of article 1 of the Constitution of the United States, and under which this petitioner (complainant in said suit) claimed a right, immunity, and exemption from further taxation than "½ of one per cent. on each share of capital stock, which shall be in lieu of all other taxes," such immunity and exemption being claimed by
66 virtue of petitioner's charter from the State of Tennessee in the above language.

That by the terms of said charter the petitioner was authorized to "purchase & hold a lot of ground for the use of the institution as a place of business, and at pleasure sell or exchange the same; and may hold such real or personal property as may be conveyed to it to secure debts due the institution."

After the grant of such charter with its charter tax fixed and definitely arranged, said bank, this petitioner, for each and every year down to and including the present year, paid to said State of Tennessee said tax of ½ of 1 per cent. on each share of its said capital stock
67 as appears from the record in *in* said cause and claimed immunity and exemption thereafter from all other taxation not only upon its capital, but also upon its bank building & the other real estate and property taken by it for debt due to petitioner, yet, said court in its said decree wholly failed to allow such exemption, and required petitioner to pay taxes on a portion of its lot and building so bought for the purpose of its business and upon all the other real estate taken for debt by said petitioner, which action in requiring such additional tax to be paid, petitioner avers and insists impaired the obligation of the contract made by said charter and violated the above-mentioned
68 section of the Constitution of the United States.

Petitioner therefore prays that your honor will endorse an allowance of a writ of error, and that the proper citation be signed by your honor to the end that the record and proceedings in said cause may be removed into the Supreme Court of the United States, to the end that said error may be corrected, and as in duty bound petitioner will ever pray.

HUMES & POSTON,
Sol's for Petitioner, the Bank of Commerce.

State of Tennessee at Jackson, April term, 1881.

The writ of error prayed for in the foregoing petition is granted and allowed in pursuance of law in such cases.

69 The plaintiff in error will execute a good bond in the sum of five hundred dollars ($500.00), to be approved by me.

JAS. W. DEADERICK,
Chief Justice of Supreme Court of Tennessee.

JACKSON, TENN., *June 11th*, 1881.

(Endorsed:) Filed June 11th, 1881. John H. Freeman, clerk, by D. P. Davis, D. C.

Writ of error bond.

Supreme Court of the United States.

BANK OF COMMERCE
vs.
E. L. MCGOWAN, TRUSTEE, ET AL.

70 Know all men by these presents that we, The Bank of Commerce, as principal, and D. H. Poston, surety, are held and firmly bound unto E. L. McGowan, trustee, et al., in the sum of five hundred ($500.00) dollars, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs and personal representatives firmly by these presents. Sealed with our seal and dated this 11th day of June, 1881.

But the condition of the above obligation is such that whereas the above-named Bank of Commerce hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of the State of

71 Tennessee, at its April term, 1881, at Jackson:

Now, therefore, if the above-bound Bank of Commerce shall prosecute its said writ of error to effect, and shall pay all costs and damages if it shall fail to make good its said plea, then this obligation shall become and be null and void; otherwise to remain in full force and effect.

BANK OF COMMERCE,
By HUMES & POSTON, *Att'ys.*
D. H. POSTON, *Surety.*

I, Bell W. Etheridge, clerk of the United States court for the western district of Tennessee, at Memphis, do hereby certify that the foregoing bond was taken by me, and that the surety is ample and sufficient for the penalty thereof.

BELL W. ETHERIDGE, *Clk*,
W. B. WEISIGER, *D. C.*

June 11th, 1881.

72 Approved by me this 11th June, 1881.

JAS. W. DEADERICK,
Chief Justice Supreme Court of Tennessee.

Citation.

United States of America to the State of Tennessee & county of Shelby, & E. L. McGowan, & Geo. B. Fleece, county trustee, & taxing district of Shelby County, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of *a* United States to be holden at Washington on the 2nd Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, sitting at Jackson, in a case wherein the Bank of Commerce is complainant in error and you
73 are defendants in error, and show cause, if any there be, why the decree rendered against said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. James W. Deaderick, chief justice of the supreme court of Tennessee, the 11th day of June, 1881.

JAS. W. DEADERICK,
Chief Justice Supreme Court of Tennessee.

Service of the above citation acknowledged for the State of Tennessee and the county of Shelby 11th June, 1881.

BENJ. J. LEA,
Attorney-Gen'l for State of Tennessee.
COUNTY OF SHELBY,
By JULIUS A. TAYLOR, *Att'y.*
TAXING DISTRICT OF SHELBY CO.,
By C. W. HEISKELL, *Att'y.*
TAYLOR & CARROLL,
Sol's for Def'ts.

74 THE STATE OF TENNESSEE:

I, John H. Freeman, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing 73 pages comprise a true, perfect, and complete transcript of the record and proceedings in this court in the case of The Bank of Commerce against E. L. McGowan and George B. Fleece, county trustees, as appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office in the city of Jackson, on this the 22d day of August, A. D. 1881, and of the Independence of the United States the 106th year.

[SEAL.]

JNO. H. FREEMAN, *Clerk.*
By D. P. DAVIS, *Deputy Clerk.*

(Indorsement on cover:) No. 1130. The Bank of Commerce, plaintiff in error, vs. The State of Tennessee and County of Shelby, E. L. McGowan & George B. Fleece, County Trustees, and Taxing District of Shelby County. Tennessee supreme court. Filed 4th November, 1881.

United States Supreme Court.

BANK OF COMMERCE, Appellant,

—vs.—

E. L. McGOWAN, Trustee, et al.

No.------

IN ERROR FROM SUPREME COURT OF TENNESSEE.

Assignment of Errors and Brief and Argument

—OF—

HUMES & POSTON, and
W. Y. C. HUMES,

FOR APPELLANT.

S. C. Toof & Co., Printers, Memphis, Tenn.

In Supreme Court of the United States

BANK OF COMMERCE,
Appellant,
—vs.—
E. L. McGOWAN ET AL.
Appellees.

No.

In Error from the Supreme Court of Tennessee.

ASSIGNMENT OF ERROR.

The error assigned is the following:

The State having authorized appellant to do a banking business upon a capital of $200,000, to "purchase and hold a *lot of ground* for the use of the institution as a place of business, and at pleasure sell or exchange the same," and to "hold such real and personal property and estate as may be conveyed to it to secure debts due the institution, and may sell and convey the same;" and furthermore, "shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes;" that taxes in addition to this charter tax of one-half of one per cent. imposed upon the banking lot and building and the real estate taken for debt due the capital stock of the bank, violates the charter contract, and is a law impairing the obligation of the contract, and violates both the constitution of the State of Tennessee as well as that of the United States in this particular.

HUMES & POSTON and
W. Y. C. HUMES,
For Appellants.

BRIEF AND ARGUMENT

—OF—

Humes & Poston and W. Y. C. Humes,

FOR APPELLANTS.

This cause presents a single question for determination, and that is, whether appellant, who by its charter, was required "to pay to the State one-half of one per cent upon each share of its capital stock, *which shall be in lieu of all other taxes*," can be compelled to pay other taxes, such as are borne by other property, upon the property used by it as a banking house and bought with capital stock, and also to pay additional taxes upon property taken by it for debt and held subject to sale to retake its place as capital stock whenever opportunity offers?

The fourth section of the charter provides that said bank may buy a lot for the purposes of its business, and may take property for debts due it.

This provision expressly contemplates the owning by appellant of real estate as part of its capital stock, and the tax of one-half of one per cent. was intended and contracted for to cover the taxation upon such portions of the capital as might be thus invested.

The Legislature creating the corporation, provided it might own its business house and such land as it had to take for debt, fixed its capital and laid a tax of one-half of one per cent. on each share, and *provided that this tax was in lieu of all other taxation.*

The only doubt about the question has arisen from the decision of the case of DeSoto Bank v. State, 6 Baxter, and the decision of this cause where the Supreme Court of Tennessee held that only so much of the building of the bank as was actually used for the purposes of the bank, shall be exempted. The decisions of this court, in Farrington v. Tennessee, 5 Otto 679, and Gaines v. R. R. Co., 7 Otto 697, have virtually decided the contrary, and as this is a Federal question, being a law impairing the obligation of a contract, we, with due deference, submit that the decision of this court should control.

The bill avers that the complainant has paid the contract price of one-half of one per cent., its charter rate. The tax is paid upon this bank building, and property taken for debt, as a part of its capital stock. *Now, to tax this property as real estate, would be making this property pay one-half of one per cent. more than any real estate of like value.*

Mr. Cooley in his Treatise on Taxation, says at page 393:

"But to tax the capital stock and also the property in "which the capital is invested, would be imposing the same "burden twice on the same property, and consequently un-"just, if not illegal."

Burrough on Taxation, at page 178, says:

"A tax on the property of a corporation and also a tax "on the capital stock is double taxation. The property of "the corporation is the tangible form in which the capital "is invested in order to conduct the operations of the com-"pany, and if the *capital stock* of a corporation *is exempt*, "*the exemption will extend to all the property owned by such* "*corporation.* It will not be presumed that the Legislature "intended to tax twice." And on page 142 same author

says: "An exemption of the stock of a corporation ex-"tends to all the property of the corporation. Capital "stock exists only nominally. The money or property it "represents is the tangible reality."

A tax upon the capital stock of a corporation is a tax upon all its property, real and personal, because the capital stock is the representation of all the property held under it.

Gordon v. Baltimore, 5 Gill 236.
Baltimore v. Balt. & Ohio R. R. Co., 6 Gill 294.

In State vs. Cumb. & Penn. R. R., 40 Md. 51, the same principle is announced. "Now, the capital stock of the "several mining companies of the State is liable to taxa-"tion according to a fixed and certain rate; and the *stock* "*being the representative of the whole property* of the corpora-"tion, the payment of the tax on the capital stock exempts "from taxation all the property, both real and personal, of "the company. And although the State may elect to tax "either the capital stock or the real and personal property "of the company, *yet it cannot tax both.*"

In Bedford v. Mayor of Nashville, 7 Heiskell 413, Judge McFarland expressed the same view as quoted from Judge Cooley. In speaking of the case in hand, he says:

"Now, by this law, the capital of the corporation is ex-"empted, and in its place the tax is divided amongst the "stockholders. It would seem to be the same thing in a "different shape."

In Willmington Railroad v. Reid, 13 Wallace 264, the exemption in the charter of the railroad company was, "*and the property of said company, and the shares therein,*

shall be exempt from any public charge or tax whatsoever," and an effort was made by the State of North Carolina to tax the franchise and rolling stock. An injunction was sued out to enjoin the tax, and the Supreme Court of the State held the tax proper, and upon a review by the United States Supreme Court *it was held that the franchises and rolling stock and lots of land appurtenant to and forming a part of the property used by the company in the transaction of its business, was exempted from the tax*, and they reversed the decision of the North Carolina Supreme Court.

In town of Connersville v. Bank of Indiana, 16 Indiana 105, the bank sued the town on orders, and the town set up as an offset taxes alleged to be due from it to the town. Set-off disallowed and judgment for the bank, from which an appeal was taken. The taxes alleged to be due the town were assessed upon the money and notes of the bank on hand. The court held: "By the charter the capital stock of the bank is not taxable for municipal purposes. The capital stock consists originally of the money paid in by the subscribers to the stock of the bank. This changes its form, and is represented by notes of other persons or corporations, *but is still capital stock so far as to be exempted from taxation.* The charter may be wrong, but this is its spirit. For deposits the bank is debtor; for notes in hand, beyond its capital stock, she is debtor by the issue of her own. Profits she divides to the stockholders in the shape of dividends," and the judgment was affirmed.

Sebring v. City of Charleston, 5th Richardson 561. The City of Charleston by ordinance imposed a tax of *five per cent.* on every *one hundred* dollars of *dividends* received on

bank or other stocks, and plaintiff enjoined the tax on the ground that he was the owner of *stock* in the State Bank, by the 10th section of whose charter it was declared, that "*the said corporation and the stock thereof* shall be relieved from the payment of *all taxes* during the time it is hereby incorporated;" and that by reason thereof, the income therefrom was not subject to taxation; and the court held the tax improper, and enjoined the same.

In State v. Hood, 15 Richardson, 178, *the stock and real estate* of each of these companies employed in, or subservient to its chartered enterprise, were exempt from taxation by charter; and an act of the Legislature was subsequently passed, levying a tax of one dollar on every one hundred dollars of the *gross income of all railroads not exempted by law;* and the railroads with such chartered exemptions contested their liability to pay the tax on the gross income. Inglis, J., at page 188, says: "Taxing the income of the "stock is only another mode of taxing the stock itself. "And hence, an exemption of the stock in terms from "taxation, would be nugatory, if the income was not "thereby equally exempt. If the income can be taxed the "stock is not exempt," and he refused the tax.

In Gordon v. Appeal Tax Court, 3 Howard, 339, the language of the exemption was, that the faith of the State was pledged "not to impose any further tax or burden "upon them during the continuance of their charters "under this act," and the United States Supreme Court held that a tax upon a stockholder by reason of their stock was a violation of this contract, and the tax was illegal.

In Douglas, Receiver, v. State, Orange, etc., E. R. R. Co., 34 N. J. 487, defendant's charter read as follows: "That

"as soon as the said company shall declare to their stock-
"holders dividends equal to seven per cent. per annum,
"from and after the commencement of the building of said
"road, and so long as said company pays dividends of seven
"per cent. per annum, the said company shall pay to the
"treasurer of the State a tax of one per centum on the
"cost of the said road, to be paid annually on the first
"Monday in January. Provided, that no other tax or im-
"post shall be levied or raised from said corporation, by
"virtue of any law of the State;" and the question was whether such tax provision protected the company against a subsequent tax law of the State, and both the Supreme Court and the court of errors and appeals sustained the charter tax.

In case of State v. John B. Haight, 34 New Jersey R., the New Jersey Railroad and Transportation Company was authorized to build a railroad from New Brunswick to some point on the Hudson river, opposite the city of New York.

By the 18th section of the act of incorporation the company was required to pay into the State treasury a certain per centum upon the capital stock of the company, and an exemption was granted from all other taxation, with the proviso that in addition to such a tax, if at any time any railroad should intersect or join to said railroad so as to make a continuous line of railroad, carrying passengers across New Jersey, between New York and Pennsylvania, then the treasurer of said railroad should make quarterly returns of number of passengers and number of tons of freight transported over the railroad to the State treasurer, and thereupon should pay to the State eight cents for each passenger, and twelve cents for each ton of freight transported as aforesaid.

The authorities of Jersey City levied a tax on the boats of the company carrying passengers and freight between Jersey City and New York. This was an action to test the validity of the tax.

Dalrimple J., delivering the opinion of the court, on page 321, says:

"I think the exemption from tax, except in the mode prescribed, extends to all the property of the company properly represented by its capital stock, and which is used for the transportation of freight and passengers on the route between New Brunswick and New York, whether upon land or water. The object which the Legislature had in view was to provide the means of transportation from New Brunswick to Hudson river opposite New York, and eventually between New York and Pennsylvania.

"To that end provision is made to exempt the prosecutors from all local taxes on property, the use of which is required to carry out the objects of the act of incorporation.

"This tax having been levied on the boats of the company, which were necessary for the transaction of their legitimate business, and which are represented by capital stock of the company, is illegal and must be set aside."

In Richmond v. Richmond and Danville R. R. Co., 21 Grattan (Va.) R. 604, the city of Richmond taxed the real estate of the railroad situated in the city of Richmond for taxes for the years 1865 and 1866. The company refused to pay it, and the tax was levied upon a locomotive belonging to the company to enforce the collection of the same. The company sued out an injunction to restrain the city and collector from enforcing the same.

The point made in defense was, that by the charter of the railroad all of its property was exempt from taxation.

The city of Richmond answered and insisted—

First. That the exemption was only from State and not municipal taxation.

Second. That if it was intended to include municipal taxation it was void as to the city of Richmond, which was incorporated before the railroad company, by its charter was authorized to levy a tax upon all real and personal property in the city, to borrow money and execute bonds, and that upon the faith of this power had incurred liabilities, and that the same could only be met by taxation upon all the property it had the power to tax. The case was heard and the injunction made perpetual.

On appeal, Staples, J., on page 607, says:

"It is insisted that it was not the intention of the Legis-
"lature to change the legal character of the property held
"by the company, but merely to define the nature of the
"shares therein; and that such shares are only exempt,
"and not the property of the corporation. The section of
"the charter referred to is as follows: All machines,
"wagons, vehicles or carriages belonging to the company,
"with all their works and all profits which shall accrue
"from the same, shall be vested in the respective share-
"holders forever, in proportion to their respective shares,
"and shall be deemed personal estate and exempt from any
"charge or tax whatsoever.

"Very slight consideration of this language will show
"the construction sought to be placed upon it is too re-
"stricted.

"The Legislature, clearly, did not mean to declare that "the shares should be vested in the shareholders, and should "be deemed personal estate. Such a provision in regard "to the shares was wholly unnecessary. The obvious mean- "ing is, that the property designated—that is, the machines "and carriages belonging to the company, 'with all their "works'—should be deemed personal estate and exempt "from any charge or tax whatsoever. If authority upon "this point were necessary, it may be found in the case of "the '*Mayor, &c., of Baltimore, v. Balt. & Ohio R. R. Co.*, "6 Gill R. 288.' It was held in that case that real and "personal property of the company was exempt from tax- "ation, under a clause in the charter which provided that "the shares of its capital stock should be deemed personal "estate, and exempt from the imposition of any tax or "burden.

"The court say, the design contemplated by the Legis- "lature, in the insertion of that clause, *was to confer a sub- "stantial, not a nominal benefit on the stockholders, and to in- "duce capitalists to risk their money in a novel and hazardous "enterprise.*

"To impute to the Legislature in the case before us an "intention to exempt the shares of stock from taxation, "and at the same time to reserve the right to tax every- "thing which constituted it a stock and gave it its value, "would be gratuitously to cast an imputation upon the "Legislature, inconsistent with every principle of judicial "courtesy.

"It was also insisted that the clause in question does not "have the effect to exempt the real estate of the company "or in any manner to change it into personal property.

"The correctness of this proposition depends upon the "construction of the phrase, 'with all their works.' The "word 'works' is one of very extensive signification. In "military engineering it means fortresses, fortifications, "ramparts, bastions, and the like. In civil engineering it "is often applied to depots, engine houses, bridges, em- "bankments and other structures essential to the franchise "and the proper conduct of a railway or other work of "public improvement. It is very clear that it is in this "sense the word is used in the present charter, and was "intended to apply to all the property, real and personal, "owned by said company and necessary to the manage- "ment of the road. If the exemption does not embrace "the real property of the company, the Legislature has "perpetrated the folly of declaring that mere chattels "should be deemed personal estate.

"It would be attributing to the Legislature the gross- "est inconsistency, to suppose it intended to release from "all taxation the machinery and rolling stock of the com- "pany, and leave it exposed to the burdens of taxation of "its depots, engine houses, coal yards, and other necessary "structures. The consideration which dictated the ex- "emption of the personal property equally applied to the "realty."

In Union Bank vs. State, 9 Yerger, 489, Judge Turley, in an able and exhaustive opinion, delivered long anterior to the granting of these charters, defines the term "capital stock" as identical with the property in which it is invested.

"Where the terms of a statute, which have received a "judicial construction are used in a latter statute, that con- "struction is to be given in the latter statute. It is to be "presumed in such a case that the Legislature, who passed "the latter statute, knew the judicial construction which "had been placed on the former one, and such construction "becomes a part of the law."

Potter's Dwarris on Statutes, page 274, note 4.
Commonwealth v. Hartwell, 3 Gray, 450.
Bogardus v. Trinity Church, 4 Sand. Ch. R., sec. 637.
Rigg v. Wilton, 13 Illinois, page 133.
Adams v. Field, 21 Vermont, 256.

In New Haven v. City Bank, 31 Conn. 108, the City Bank was chartered in 1831, and by its charter it was provided that if it would subscribe $100,000 to the Hampshire and Hampden Canal Corporation, *its capital stock* shall be and remain free from taxation until the tolls received shall reach a dividend of six per cent. on the capital stock, after which time it shared a like tax with other bank stock.

The subscription was made, and the tolls have never paid a dividend of six per cent.

In 1851, the bank, owning no banking house, bought a lot and erected a suitable building out of the capital stock, which it is still occupying, and it could return its capital stock to the owners without a sale of the banking house—a portion of the house was not used for banking purposes, and was being rented out.

In 1854 the Legislature provided that any real estate owned by a bank and not used for its proper business, should be liable to taxation as other real estate, and in

1860 that portion of the property not used by the bank was assessed for taxation, and this question was alone submitted.

Sanford, J., on page 109, says: "The only question be- "tween the parties is, what is the 'capital stock' thus ex- "empted?"

In speaking of the bank, the same Judge, on same page, "says: "All its property, its capital, its stock, was con- "tributed by individual subscribers, from their private "funds, and was by them intrusted to its keeping and man- "agement, for their benefit, taking from it no tangible "property in return—nothing but the evidence of their "contributions and their consequent interest in the com- "mon fund, or capital stock, thus contributed."

"Originally, then, 'the capital stock of the bank' was "all the property of every kind, everything which the "bank possessed. All this 'capital stock,' all of it, in re- "ality belonged to the contributors, it being intrusted to "the bank to be used and traded with for their exclusive "benefit; and thus the bank became the agent of the con- "tributors, so that the transmutation of the money origin- "ally advanced by the subscribers into property of other "kinds, though it altered the form of the investment, left "its beneficial ownership unaffected; and every new acqui- "sition of property, by exchange or otherwise, was an "acquisition for the original subscribers or their representa- "tives, their respective interests in it all always continuing "in the same proportion as in the aggregate capital origin- "ally advanced. *So that, whether in the form of money, bills "of exchange or any other property in possession or in action "into which the money originally contributed has been changed*

" *or which it has produced, all is, as the original contribution* " *was, the capital stock of the bank, held as the original contri-* " *bution was, for the exclusive benefit of the original contribu-* " *tors and those who represent them.*

" The original contributors, and those who represent " them, are the stockholders; each one of them holds an " undivided portion of the entire stock, and, together, they " hold the entire stock of the corporation. The stock cer- " tificate which each of them holds is the muniment of his " title, specifying his proportion of interest in all the prop- " erty of the corporation, and all these stock certificates to- " gether represent the entire property of the bank in " whatever form it may exist.

" By the terms of the charter, the capital stock of the " bank was to consist of five thousand shares, of one hun- " dred dollars each. Had that amount been subscribed, " and at once paid in, the money so accumulated would " have been the capital stock of the bank, and as such ex- " empted from taxation. And when one hundred thousand " dollars of the money thus accumulated had been paid out " by the bank on its subscription for stock of the Hamp- " shire and Hampden Canal Corporation, that canal stock " took the place of the money paid for it, and became *pro* " *tanto* capital stock of the City Bank, and exempt, as the " money was, from taxation.

" And so, when afterwards, for debts previously contrac- " ted, houses, lands, or goods were necessarily taken in " payment, such houses, lands, or goods became in lieu of " the money for which they were received, part of the cap- " ital stock, and entitled to the same exemption. Other- " wise the canal stock thus purchased, and the houses, land " and goods thus acquired, might be taxed, and thus the

"promised exemption, purchased by the shareholders, and "assured to them by the charter, would be rendered worth- "less and delusive.

"We see no reason for a distinction in this respect be- "tween real estate so taken by the bank in payment of a "debt and the real estate which is the subject of this con- "troversy.

* * * * * * * *

"The entire cost of the building was paid, and properly "paid, out of 'the capital stock' existing in the form of "money, and thus the building became what the money "paid for it was—capital stock in its stead.

"In putting on the second story of the building the di- "rectors may have made an unprofitable or otherwise ill- "advised investment of the stock, but of such investment, "unless it was illegal, none but the stockholders can com- "plain.

* * * * * * * *

"But the primary object of the bank in erecting the "building was the accommodation of the proper business "of the bank, and the temporary renting of the room was "but an incident to the ownership, neither affecting the "title to the property nor the right to hold it free from "taxation.

"We are satisfied that the property in question is to be "regarded as a part of the capital stock of the corporation, "and therefore exempted from taxation by the express "provisions of the charter.

"We cannot, in the absence of explicit declarations to "that effect, impute to the Legislature an intention to pro- "vide merely that the shareholders should be individually "exempt from taxation on account of their respective

"interests in the property of the bank, while it retained "the power and right to assess and tax all or any portion "of that property against the bank itself; such reservation "of right would render the promised exemption a worth- "less figment.

"But it is said there is an obvious distinction between "the real property of a corporation and the shares of cap- "ital stock in the hands of its stockholders, and we may "add that there is the same difference between the *personal* "property of the corporation and its stock in the hands of "its stockholders, but this consideration goes but a very "little way, if at all, toward the solution of the question "now before us. That question is whether the promised "exemption, which confessedly covers the intangible ideal "rights, called shares, in the hands of the stockholders, "covers also the property, real and personal, in which the "whole value of those shares consists; whether it is pos- "sible to impose a tax upon the latter without having the "entire burden of the imposition fall upon the former; "and if it is not, whether the construction contended for "by the town can be the true construction of the grant. "And for the purposes of this question we can see no dif- "ference between the real and personal property held by "the corporation. The shares of capital stock cover and "include them both."

In Hannibal and St. Joseph R. R. Co. v. Shacklett, 30 Missouri, page 550—

The railroad company brought suit to recover from Shacklett, the tax collector, $615.86 paid by it as taxes on its real and personal property, on the ground that the property taxed was used and necessary to operate the road

and was exempt from taxation; that the assessment was void, and that the collector having levied for said tax on its property, it paid the same under protest, and brings this action to recover it back.

A demurrer was interposed and sustained, and an appeal taken by the railroad company.

Napton, J., on page 558, says:

"Confining ourselves entirely to the railroad corporation whose property in this case has been subjected to "taxation, without undertaking to give any construction "to the law with reference to corporations of a different "character, the question is, upon this provision of the general revenue law, whether the road-bed, machinery, depots, and other property used by the company are to be "considered as a part of the capital stock of the company. It is undoubtedly not literally the capital stock, "taking these words in their usual acceptation. *Capital "stock, in its strict signification, exists only nominally; the "money or property which it represents is the tangible reality.* "The one is the representative of the other, and if the "stock and the property it represents are both taxed, the "taxation is double."

In Memphis and Charleston R. R. v. Gaines, MSS. opinion Supreme Court of Tennessee, Judge McFarland, delivering the opinion of the court, says: "That the term "capital stock in general has the meaning contended for, "*as distinguished from the shares of the stockholders, is well "established by authority;* and it may be further conceded "that had the 38th section contained the provisions forever "exempting the capital stock, *without more*, this exemption

"would extend to and embrace any property representing "the capital stock—as the road itself, and fixtures."

In Gaines v. Railroad Companies, 97 U. S. R. 697, where the above case was reviewed, this court declares: "That "an exemption of the capital stock from taxation is equiv- "alent to an exemption of the property into which the "capital stock has been converted, when taking the whole "charter together, it is apparent the Legislature so in- "tended." "Thus," (say the court,) "the capital stock of "a bank usually consists of money paid in to be used in "banking, and an exemption of capital stock from taxa- "tion must necessarily mean an exemption of the securi- "ties into which the money has been converted in the "regular course of a banking business. And, in general, "an exemption of capital stock without more, may, with "great propriety, be considered, under ordinary circum- "stances, as exempting that which, in the legitimate oper- "ations of the corporation, comes to represent the capital."

Now, in the case at bar, the stock authorized is $200,000, and the very charter itself authorizes the "*purchase of a lot of ground for the institution as a place of business*," out of the capital stock.

The charter says *a lot of ground* may be purchased. With what? Capital stock? What else was in contemplation?

Now, the lot without improvements would be useless; in fact, the charter reading, "as a place of business," contemplates that it shall be improved.

Then, if it was only authorized to be bought out of capital stock, and capital stock was only to be taxed one-half of one per cent., to tax the real estate or any portion

of it as real estate, the addition to the charter tax would not only not be a benefit to the corporation, but would inflict an additional tax of one-half of one per cent. on the property, simply by reason of its being the property of a chartered institution.

Did the Legislature contemplate any such thing? Can the charter be read in any such light?

The allegations of the bill on this point, are as follows: "Complainant alleges that in the assertion and exercise solely of the privileges, franchise and authority conferred on complainant by the second clause of the fourth section of the charter providing that complainant 'may purchase 'and hold a lot of ground for the use of the institution as 'a place of business,' it did buy with a part of its capital stock said lot of twenty-four and three quarters feet front on Madison street by seventy-four feet deep, with the building and improvements thereon, solely for the use of the bank as a place of business and has used it continuously for that purpose ever since its purchase, having occupied said building for its legitimate banking business and for none other. It is true, that as the bank has not yet required the use of the cellar, the second and third stories of the building for its own banking purposes, complainant has heretofore and does now temporarily let out the different rooms in the cellar and in the second and third stories for a moneyed rent, and will continue to do so until complainant shall require the use of these rooms for its own banking purposes. But complainant alleges that the sole and single purpose of complainant in purchasing said lot with the improvements thereon, was to obtain a place of business for the use of the institution, and it has been

continuously so held up to the present moment. As above averred, the lot has only a front of twenty-four and three-quarters feet and a depth of seventy-four feet, affording in the full capacity of the building on the first floor, only room enough for the officers and employes of the bank in the discharge of their ordinary duties, and for the vaults, safes and other essential furniture of the bank."

As the question was finally determined on demurrer these allegations are taken for true. Then here is a lot $24\frac{3}{4}$x74 feet, the first story of the building therein covering the whole lot, being entirely used for the purpose of the bank, and the other temporarily rented until the necessities of the bank require it for its use. The exemption was to cover $200,000 of the capital stock—a portion of which might go into the purchase of the banking house, and upon one-half of one per cent. being paid to the State upon each share of the capital stock no other taxes were to be paid, and with this exemption and after the place of business is bought, because the whole house is not immedmediately used, the State, county, and city governments, although they take the one-half of one per cent. on that portion not so used, in addition seek to assess an onerous taxation upon it, assessing it like other property. The result is that the portion not so used, valued at $9,000, pays one-half of one per cent., the charter rate, and also the same rate that other real estate pays—the taxation being double. The house and lot were bought for the bank and its use. The *whole lot* is not more than sufficient, as the bill avers, the first floor covers the whole lot. The charter reads "may purchase *a lot* for the institution as a place of business." Now, here the lot is shown not

to be a purchase in excess of the demands and requirements of the bank; in fact, the bill avers that the whole lot is necessary, and that the first story covering the whole lot is so used, but, because there is a cellar and the second and third stories, the State authorities say your *lot* is not more than your business requires, but you have a basement and two upper stories that you now do not need, and upon this you must pay tax. The proposition is preposterous. We were authorized to buy a lot as a place of business. Now, if the same is improved and is not shown to be an excessive purchase, of which the corporate owners must be the judges, then we insist that the State, or its officers, can not disregard the chartered rights and assess the property again.

Are the bank officers to build only a shanty on the lot, or are they authorized to so improve it as it will meet all the future requirements of the institution?

If these directors have invested $9,000 more on the building than its charter allowed, then this would operate as a forfeiture of their charter. Did the Legislature contemplate that only the exact present requirements of the company were to be met in the purchase, or might not the officers of the company decide the question as to the location and improvement of the lot? $200,000 was set apart and upon this a contract tax was paid or agreed to be paid. We insist that this is a question the courts cannot enquire into.

The next view is that the property taken for debt due the bank is not taxable. The bill avers: "All three of the above lots were conveyed by Jesse Moore, now deceased, formerly a member of the firm of Moore, Emery

& Co., by a deed of trust to R. A. Parker, trustee, to secure loans made to Moore, Emery & Co. by complainants, to the amount of $20,000, and the obligors failing to pay the full amount of the debt by something over $11,000, the three lots were sold under the deed of trust and bought by complainant *to save a part of the debt.* * * Complainant now only holds the property for sale, and will make sale forthwith to restore so much of its capital. * * Complainant alleges that the money so invested by it in these three lots constitute a part of its capital, and because so invested, solely and in the mode and for the purposes above set forth."

The demurrer admitting these facts, renders it certain that the capital thus attempted to be saved by a purchase of real estate as was authorized by the charter, will be subjected to a double tax if this tax can be maintained. The bill avers that it was bought to save the capital, and it only held it to make a sale to restore the capital thus depleted.

The opinion of Judge Cooper hardly treats the question fairly. The language of the charter is: "And may hold such real or personal property and estate as may be conveyed to it to secure debts due the institution, and may sell and convey the same." The charter thus contemplates that debts due the capital stock may be secured by conveyance of real and personal property, and the company may sell and convey it.

Here the conveyance was made, not direct to the bank, but to Parker, trustee, for it, and when sold for its account it bought it in to save and protect itself. Exactly what the charter provided. The trust to Parker, trustee, was

alone to secure the bank, and the bill avers that it alone bought in the property to secure its capital. The charter rights and exemptions amount to nothing but a trap if this be so; for a bank may be compelled, in securing $50,000 of capital, to take temporarily $50,000 of real estate. If then you tax the $50,000 so invested in real estate as a part of its capital stock with the charter rate of one-half of one per cent. and then tax it with the same rate as other real estate bears, you have double taxation in the face of a charter which authorizes such security, and provides a contract rate in lieu of all other taxation.

We respectfully submit that the cause should be reversed and the chartered rights of appellants be preserved.

HUMES & POSTON, and
W. Y. C. HUMES,
For Appellants.

In Supreme Court of the United States,

No. .....

BANK OF COMMERCE,

APPELLANT,

VS.

E. L. McGOWAN,

TRUSTEE, ET AL.

BRIEF AND ARGUMENT

OF

TAYLOR & CARROLL, AND C. W. HEISKELL,

AND B. J. LEA,

FOR APPELLEE.

OCTOBER 29, 1881.

MEMPHIS, TENN.:
Jones, Huhn & Co., Printers, Binders, &c., 12 Jefferson Street.
1881.

IN SUPREME COURT OF THE UNITED STATES

1881.

BANK OF COMMERCE,
APPELLANT,
VS.
E. L. McGOWAN,
TRUSTEE, ET AL.

No.....

FACTS.

1. The charter of appellant corporation authorizes it "to "purchase and hold a lot of ground for the use of the institu- "tion as a place of business, and, at pleasure, sell and convey "the same," and "to hold such real and personal estate as may "be conveyed to it to secure debts due the institution, and may "sell and convey the same," and, furthermore, "shall pay to "the State an annual tax of one-half of one per cent. on each "share of capital stock, which shall be in lieu of all other "taxes."

2. The appellant bought a lot, and put thereon a three-story brick building. The basement and the upper story it rents out, and the middle story alone it uses for its charter purposes—in this alone the bank does its banking business. (f. p .) It further owns in fee real estate (three lots) which was sold *and the bank bought in, in satisfaction of debts,* secured to it by trust deeds on this property. (f. p. .)

3. The State, County and Taxing District governments claimed taxes on all of the above property, except that actually used for banking purposes, to-wit, the middle story of the bank

building, (f. p.), which appellant paid under protest, and brought this suit to recover them back. Upon demurrer to the bill, the Supreme Court of Tennessee held that only so much of the above property as was used for banking purposes was exempt from taxation under the charter of the bank. From this judgment the bank appeals to this court.

Its contention is, that the charter exemption, to-wit, "shall "pay to the State an annual tax of one-half of one per cent. "on each share of capital stock, which shall be in lieu of all "other taxes," protects, not only all of the bank building owned by it, though it may use only a part thereof as a banking house, and may use the balance, as any other real estate owner, for rent. And further, that it covers and exempts from taxation, not only real estate held for the *security of a debt*, but protects *all* property which the bank may have bought in, where the property held in trust by it to secure debts is sold *in satisfaction of such debts.*

BRIEF AND ARGUMENT.

In DeSoto Bank v. City of Memphis, [6 Bax., (Tenn.) 415,] the Supreme Court of Tennessee decided that where a clause in the charter of a bank exempts from taxation a building which the company, under the charter, are allowed to erect for the purpose of carrying on the business of the bank, if any part of such building be not so occupied, but is leased out, the exemption will reach and cover only so much of the building as is necessary for the use of the bank, but not that part which is rented out. The power to "purchase and hold a lot of ground for the use "of the institution as a place of business, and, at pleasure, sell "and exchange the same," is contained in the DeSoto charter in precisely the same words as in appellant's charter, and the exemption clause of the DeSoto charter is the same *in hæc verba* as appellant's charter exemption.

This precise question has, therefore, been twice adjudicated by the Supreme Court of Tennessee, so far as that part of the

bank building rented out is concerned—in the 6 Bax. case supra, and in this case, (f. p. .)

The only additional element in this case is the real estate which the bank has bought in, in satisfaction of debts.

But the principle upon which the 6 Bax. case and the decision in this case rests, covers this part of the case. That principle is, "The company is a private corporation created for bank-"ing purposes. It has not conferred on it the general power "of purchasing or of becoming owner of real estate, but has "the special grant of power to purchase and hold a lot of "ground for the use of the institution *as a place of business.* "In the language of the court, in the State v. Commissioners, 3 "Zabris, 513, '*This power is limited to, and can only be exercised,* "to effect the purposes for which it was conferred by the gov-"ernment. *It is a part of the franchise,* and the exercise of the "corporate franchise, *being restrictive of individual rights, can-"not be extended beyond the letter and spirit* of the act of incor-"poration.'" "We add," say the Tennessee court, "that there "is no power conferred to hold real estate for any other pur-"pose than 'for the use of the institution as a place of busi-"ness.'" Such is the language of the charter, and is the only "privilege granted. It cannot be extended beyond its terms. "To quote again from the above case: 'But there must be a "limit somewhere to this power (even if it were not defined in "the charter) to extend its operations and hold property ex-"empt from taxation under the exempting clause; that limit "must be fixed *where the necessity* ends, *and mere convenience* "*begins.*'"

See, also, 4 Zab., 371; 3 Harrison, 73.

This reasoning applies to both of the exemptions claimed in this case, and is a complete answer to argument in their favor. And so Cooper, J., delivering the opinion in this case, (f. p. ,)reaffirming the 6 Bax. case *supra*, says, (f. p.):

"It may be added, that the exemption from taxation of the "corporate property, except to the extent prescribed, was in "consideration of the use of the corporate capital for the pur-

" poses of the incorporation, *and the contract ceased to operate* " *where taxable property was held for any other purpose.*" * * * " The corporation may become the owner of property outside " of the purpose of its incorporation." If so, " the authori- " ties agree, that property beyond the legitimate wants of a " corporation for its corporate purposes is not within an ex- " emption of all property from taxation."

Wilmington R. Co. v. Reid, 13 Wal., 268.
State v. Newark, 1 Ducht, 315.
State v. Mansfield, 3 Zab., 510.
Vermont Central R. Co. v. Burlington, 28 Vt., 193.

What was the purpose of the exemption ? (1.) That part of the capital stock invested in a banking house, or so much of the same as should be used for charter purposes, should be exempt. (2.) That that real estate which was held as *security* for debts—both of these being within the scope and purview of the charter franchises—should be exempt. But manifestly that part of the bank building which is not used for banking purposes, but for gain by renting, stands outside of the charter purposes, and, therefore, outside of the charter exemptions; and equally, if not for stronger reasons, that property which is held, not to *secure a debt*, (and this is what this clause of the charter means, and only this), *but bought in and held in fee* in satisfaction of a debt, would not be exempt, because this is held outside of charter purposes. Otherwise, it might be that the bank would hold half of the realty of the town, and hold it exempt from taxation.

As the Tennessee court say in this case, (f. p.), " Clearly " such exemptions would not protect property which the *corpo-* " *ration* is without authority to hold. If it were otherwise, the " corporation might abandon the purposes for which it was " created, and invest its capital in property, and extend the " immunity, conceded for a *specific* object, to the exemption of " that property from the common burdens of government."

As to the three lots, which the bank owns, they say, (f. p.): " The bill shows that these were bought by the bank, at a sale

" made by the trustee of one of its debtors, under a deed of trust " or assignment, for the benefit of creditors. *By the purchase,* " the realty ceased to be assets, and became the absolute prop- " erty of the bank, and it is holding it in order to secure an " advantageous sale. The provision of the charter is, that the " corporation may hold such real and personal property and " estate as may be conveyed to it to secure debts due to it, and " may sell and convey the same."

" But the realty in question was not conveyed to the bank " to secure debts due to it. It was conveyed in satisfaction of " debts to the extent of the bid made at the sale. It is clearly " not within the language of the charter, nor do we think it " within its spirit or intent. The object was to enable the bank " to take title to land as a security for debt, not to invest its " capital in land, either for a longer or shorter period. Land " held as security would be subject to taxation, for it would " not be a part of the capital stock of the bank. Land held " in the bank's own right would be subject to taxation also, " unless 'held for the use of the institution as a place of busi- " ness.' "

Nor do we understand any of the authorities referred to by opposing counsel to conflict with these views.

The quotations from Cooley and Bur. on Taxation, (Humes & Poston's Brief. p. 3), only mean, can only mean, where the property is used in the legitimate corporate business, and in furtherance of strictly corporate purposes. Both are discussing the general question of taxation of corporations, and evidently speak only of corporate property used in legitimate corporate business. And so we read the cases in 5 and 6 Gill and 40 Md., referred to by opposing counsel at p. 4, (Humes & Poston's Brief); and also cases 3 Howard, 339; 34 New Jersey, 487; 34 N. J., 34; 21 Grat, Va. R., 604; (ib., pp. 6, 7, 8.) And to the same effect, and only to the same effect, is the case in 9 Yer. (Tenn.) —; (ib., p. 11;) and case in 30 Mo., 550; (ib., pp. 16, 17.)

See opinion of Tennessee Supreme Court, (f. p. .) They say: " These authorities cover cases in which property was " legally bought and held for corporation purposes."

The 7 Heiskell case, referred to by them on same page, so far as we can see, has no application to this case.

The case in 13 Wal., 264, referred to by them, same page of Brief, and the case of Cornersville v. Bank of Indiana, 5 Richardson, 561, make this clear. We quote from the 13 Wallace case: "The rolling stock and lots of land appurtenant to and "forming a part of the property *used by the company in the* "*transaction of its business*, was exempted from the tax."

The only case relied on by opposing counsel, presenting this exact question, is New Haven v. City Bank, 31 Con., 108. This case decides the question in their favor; but we submit that it is radically unsound; and, in the language of the 6 Bax. case, *supra*, p. 417, refusing to follow this Connecticut case, we say: "With the reasoning of this opinion, and the "conclusion of the court, we are not satisfied; nor do we think "it accords with the weight of authority on the question."

Counsel for appellants refer to Farrington v. Tennessee, 5 Otto, 679, and Railroads v. Gaines, 7 Otto, 697, as "virtually "deciding the contrary" of the Bax. case, *supra*, and the holding of the Supreme Court of Tennessee in this case.

We do not so understand them. Farrington v. State only decides that the charter provision of a bank to "pay the State "an annual tax of one-half of one per cent. on each share of "the capital stock subscribed, shall be in lieu of all other "taxes," is a contract, and that a subsequent revenue law of the State, imposing an additional tax on the shares in the hands of stockholders, impairs the obligation of that contract, and is void. What that has to do with this case we cannot see.

Nor has the case of the Railroads v. Gaines any more to do, in support of opposing counsels' position. On the contrary, that case, like all of the other cases cited by counsel for appellants, so far as the questions now before the court are concerned, only holds that the "exemption of capital stock, without more, "may, with great propriety, be considered, under ordinary "circumstances, as exempting that which, *in the legitimate* "*operations of the corporation*, comes to represent the capital," which aligns this case with all the others referred to by them,

and the remarks of Judge McFarland, in the same case, quoted on p. 17 of Humes & Poston's Brief, will fall in the same category.

The question in this case, really, is reduced to this: Is the tax here in controversy a tax on property held by the bank in the legitimate and necessary use of the corporation, in its business of banking, or is it property outside of that legitimate and necessary use? If the former, we concede the exemption; if the latter, and we think it has been clearly shown to fall within the latter, then the tax is valid. If to own real estate and rent it out is a legitimate *banking* business, then the exemption is conceded. If it is not, then the tax is valid. Then there is no impairment of the charter contract of the bank, and, therefore, the judgment of the court below should be affirmed. We confidently submit that this is the true view, especially when exemptions are never to be presumed. On the contrary, the presumptions are always against them.

7 Otto, p. 708.

We conclude, therefore, that the exemption covers, and only covers, that property held by the bank in the legitimate prosecution of the corporate business. We submit that only the middle story of the bank building is so used, and, therefore, the exemption only covers this. Therefore, the decision below should be affirmed.

TAYLOR & CARROLL and B. J. LEA,
For State and County, and
C. W. HEISKELL and B. J. LEA,
For Taxing District.



14—498

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~505.~~ 223

FREDERICK VIETOR, GEORGE VIETOR, CARL VIETOR, THOMAS VIETOR, JR., AND FRITZ ACHELIS, PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 5, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 505.

FREDERICK VIETOR, GEORGE VIETOR, CARL VIETOR, THOMAS VIETOR, JR., AND FRITZ ACHELIS, PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Frederick Vietor, George F. Vietor, Carl Vietor, Thomas Vietor, junior, and Fritz Achelis, plaintiffs, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said Frederick Vietor, George Vietor, Carl Vietor, Thomas Vietor, junior, and Fritz Achelis, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred & second.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) 4192. U. S. Supreme Court. Frederick Vietor et al. vs. Chester A. Arthur. Writ of error. Hartley & Coleman, plff's att'ys. U. S. circuit court. Filed Mar. 2, 1878. John I. Davenport, clerk.

The within writ is hereby allowed.
New York, Feb'y 28, 1878.

SAM'L BLATCHFORD.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Frederick Vietor, George F. Vietor, Carl Vietor, Thomas Vietor, junior, & Fritz Achelis, plaintiffs in error, against Chester A. Arthur, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 15th day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

3 *Summons for relief.*

Superior court of the city of New York.

FREDERICK VIETOR, GEORGE F. VIETOR, CARL Vietor, Thomas Vietor, jr., & Fritz Achelis, plaintiffs,
against.
CHESTER A. ARTHUR, DEFENDANT.
} No. 5.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of the city of New York, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 29 Nassau street, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated New York, Mar. 12, 1875.

H. J. BEGLY,
Plaintiffs' Attorney.

(Endorsed:) 4192. Superior court of the city of New York. F. Vietor et als. against C. A. Arthur. No. 5. Summons. H. J.
4 Begly, plaintiffs' attorney, 29 Nassau street, to C. A. Arthur, defendant. Received Mar. 27, 1875. U. S. attorney's office. Rec'd M'ch 12, '75.

5 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you, against Chester A. Arthur, defendant, by Frederick Vietor & als.[5], plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 14th day of June, 1875, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 7th day of June, in the year one thousand eight hundred and seventy-five.

[SEAL.] KENNETH G. WHITE, *Clerk.*

GEORGE BLISS,
Defendant's Attorney.

6 (Endorsed:) U. S. circuit court. Chester A. Arthur ads. Vietor[5]. Certiorari. George Bliss, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, June 7, 1875.

Yours, &c.,

GEORGE BLISS,
Defendant's Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, June 7, 1875.

H. J. BEGLY,
Plaintiffs' Attorney.

7 THE UNITED STATES OF AMERICA.

Circuit court of the United States for the southern district of New York, in the second circuit, of the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and seventy-six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick Vietor, George F. Vietor, Carl Vietor, Thomas Vietor, jr., and Fritz Achelis, plaintiffs in this suit, come here into court, and by H. J. Begley, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the twelfth day of March, last past, an action was commenced in the superior court of the City of New York, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against Chester A. Arthur, the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the same day. That the defendant afterwards, by George Bliss, esquire, his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards and on the fourteenth day of June, in the year of our Lord one thousand eight hundred and seventy-five, the said action was in due form of law
8 removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided, and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true. Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the said plaintiffs accordingly, by H. J. Begly, their attorney, complain of the defendant in this suit being in custody, &c., of a plea of trespas on the case for promises, for that whereas the said defendant heretofore, to wit, on the day of the date of this declaration, to wit, at the city of New York, in the district aforesaid, was indebted to the said plaintiffs in the sum of one thousand and twenty-two and $\frac{40}{100}$ dollars, lawful money of the United States of America, for duties on certain merchandise, to wit, hosiery, gloves and underwear, imported into, and entered at the collection district of the United States for the city of New York, on or about the following dates, to wit: June 2, July 15, 20, Sept. 21, Oct. 8, 19, and 27, in the year one thousand eight hundred and seventy-four, in the following ships or vessels, to wit, the steamers City of Brooklyn, City of Chester, Calabria, Russia, Parthia, and Celtic from Liverpool, unlawfully demanded, exacted, and received, at the city of New York aforesaid, in the district aforesaid, by the said defendant, then collector of the customs for the district aforesaid, under
9 color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest in writing in due form of law. And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last

aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money above mentioned, when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of two thousand dollars lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant. And for other money by the said defendant, before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when he, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant (although often afterwards requested so to do) has not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars, and therefore the said plaintiffs bring suit, &c.

H. J. BEGLY,
Attorney for the Plaintiffs.

(Endorsed:) 4192. U. S. circuit court. F. Vietor et al. vs. C. A. Arthur. No. 5. Declaration. H. J. Begly, No. 29 Nassau street, attorney for plaintiffs.

To GEORGE BLISS, Esq., *Deft's Att'y:*

SIR: Please to take notice, that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court, at the city of New York, requiring the within named defendant to plead to said declaration in twenty days after service of a copy thereof, and notice of said rule on his attorney, or judgment, &c.

New York, Feb'y 25, 1876.

H. J. BEGLY,
Attorney for Plaintiffs, 29 Nassau Street.

FEB. 25, '76.

Circuit court of the United States for the southern district of New York.

F. VIETOR ET AL. *vs.* C. A. ARTHUR. } No. 5.

NEW YORK, *April* 30, 1875.

GEORGE BLISS, Esq.,
Defendant's Attorney:

SIR: Please take notice that the following is a bill of particulars of

the plaintiffs' demand in this case, and for the recovery of which this action is brought by reason of money illegally exacted of the plaintiffs by the defendant, as collector of the port of New York, on merchandise imported in the vessels and at the dates named.

Truly yours,

H. J. BEGLY,
Plaintiffs' Attorney.

Bill of particulars.

Names of importers: Fred. Vietor & Achelis.
Description of merchandise: Hosiery.
Place whence imported: Liverpool.
Name of vessel: City of Brooklyn, City of Brooklyn, City of Chester.
Date of invoice: May 8, 1874, June 26, 1874, July 3, 1874.
13 Date of entry at custom-house: June 2, 1874, July 15, 1874, July 20, 1874.
Date of payment of duties: June 2 & July 8, 1874, July 15, 1874, July 24, 1874.
Date of filing protest: July 9, 1874, July 15, 1874, July 21, 1874.
Date of appeal to Sec'y of Treasury: July 24, 1874, July 24, 1874, July 24, 1874.
Date of decision on appeal: Dec. 23, 1874, Dec. 23, 1874, Dec. 23, 1874.
Amount of excess claimed: $64.35, $643.95, $91.80.

Names of importers: Same.
Description of merchandise: Same.
Place whence imported: Same.
Name of vessel: Calabria, Russia, Parthia.
Date of invoice: Sept. 4, 1874, Sept. 21, 1874, Oct. 3, 1874.
Date of entry at custom-house: Sept. 21, 1874, Oct. 8, 1874, Oct. 19, 1874.
14 Date of payment of duties: Sept. 21, 1874, Oct. 8, 1874, Oct. 19, 1874.
Date of filing protest: Sept. 22, 1874, Oct. 8, 1874, Oct. 19, 1874.
Date of appeal to Sec'y of Treasury: Oct. 31, 1874, Oct. 31, 1874, Oct. 31, 1874.
Date of decision on appeal: Dec. 23, 1874, Dec. 23, 1874, Dec. 23, 1874.
Amount of excess claimed: $76.95, $13.50, $71.55.

Names of importers: Same.
Description of merchandise: Same.
Place whence imported: Same.
Name of vessel: Celtic.
Date of invoice: Oct. 10, 1874.
Date of entry at custom-house: Oct. 27, 1874.
Date of payment of duties: Oct. 27, 1874.
15 Date of filing protest: Oct. 27, 1874.
Date of appeal to Sec'y of Treasury: Oct. 31, 1874.
Date of decision on appeal: Dec. 23, 1874.
Amount of excess claimed: $60.30; total, $1,022.40.

(Endorsed:) United States circuit court. F. Vietor et al. vs. C. A. Arthur. No. 5. Bill of particulars of plaintiff's demand. H. J. Begly, plaintiffs' attorney, 29 Nassau street. To George Bliss, esq., defendant's attorney. Ap'l 30.

16 *Plea.*

United States circuit court, southern district of New York.

CHESTER A. ARTHUR
ads.
FREDERICK VIETOR & AL. } No. 5.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared, against the said defendants, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

GEORGE BLISS,
Defendant's Attorney.

To H. J. BEGLY, Esq.,
Plaintiffs' Attorney.

(Endorsed:) 4192. U. S. circuit court. Chester A. Arthur ads. Vietor. 5. Plea. George Bliss, attorney for defendant.

Due service of a copy of the within is hereby admitted.
New York, March 6, 1876.

H. J. BEGLY,
Pl'ffs' Att'y.

You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court, for the southern district of New York.
New York, March 6, 1876.
Yours, &c.,

GEORGE BLISS,
Defendant's Attorney.

To H. J. BEGLY, Esq.,
Plaintiffs' Attorney.

17 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Thursday, the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.
Present, the honorable Judge Shipman, circuit judge.

FREDERICK VIETOR ET AL.
vs.
CHESTER A. ARTHUR. } 4192.

On motion of Edward Hartley, esqr., of counsel for the plaintiffs, ordered trial.

Counsel for the respective parties consenting, in open court, it is ordered that the same jurors be sworn in this case that were sworn in the case of Otto K. Krouse et al. vs. Chester A. Arthur, in which a verdict was this day rendered by direction of the court.

Jurors sworn: David B. Keeler, Solomon W. Albro, Joseph W. Duryes, J. A. Monheimer, Herman Nordlinger, Fred'k H. Abeel, Geo. E. Underhill, Rob't H. Hutchinson, Jas. B. Newton, Rob't Parkhill, John B Trenor, John Jackson.

18 Mr. Hartley opens the case on the part of the plaintiffs.

Evidence for the plaintiffs—stipulation respecting evidence in this case, plaintiffs' protests, appeals, and invoices.

Plaintiffs' rest, defendant rests.

Henry E. Tremain, of counsel for the defendant, moves that the court direct the jury to find a verdict for the defendant.

Mr. Tremain is heard in support of said motion.

Mr. Hartley is heard in opposition thereto.

Mr. Hartley moves that the court direct the jury to find a verdict for the plaintiffs.

The court directs the jury to find a verdict for the defendant, and the jury say that, by direction of the court, they find a verdict for the defendant.

Mr. Hartley excepts to the ruling of the court in directing the jury as aforesaid.

On motion of Mr. Hartley, ordered that the plaintiffs have thirty days in which to make and prepare a case, with leave to turn the same into a bill of exceptions.

19 *Judgment.*

United States circuit court, southern district of New York.

FREDERICK VIETOR & AL. }
vs. }
C. A. ARTHUR. }

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury at a circuit court of the October term, 1877, and the issues having been tried, and a verdict for the defendant having been duly rendered on the twenty-fifth day of October, 1877, and his costs having been adjusted at $48.97:

Now, on motion of Stewart L. Woodford, United States attorney for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.97, his taxed costs, and have execution therefor.

Judgment signed this 15 day of Jan'y, 1878.

J. M. DUEL.
Dep. Clerk.

20 4192.

United States circuit court.

FREDERICK VIETOR & AL. }
vs. }
C. A. ARTHUR. }

Judgment roll.

STEWART L. WOODFORD,
United States Attorney, for Defendant.

Filed 187 .
Costs, $48.97.
U. S. circuit court. Filed Jan. 15, 1878. John I. Davenport, clerk.

21 *Bill of exceptions.*

Circuit court of the United States for the southern district of New York.

FREDERICK VIETOR ET AL.
vs.
CHESTER A. ARTHUR. } 4192.

Afterwards, to wit, on the 26th day of October, 1877, at a stated term of this court, begun and holden at the city of New York, to wit: on the third Monday of October, 1877, before the honorable Nathaniel Shipman, district judge of the United States for the district of Connecticut, sitting as circuit judge, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly empannelled and sworn for that purpose, the said plaintiffs being represented by Hartley & Coleman, and the said defendant by H. E. Tremaine, esquire.

And, in the course of the trial, the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings and charges of the court, and to the refusal of the court to give instructions to the jury, as then and there prayed for by them, which said exceptions are hereinafter severally set forth.

22 On the trial the following facts appeared:

That during the times mentioned in the declaration and bill of particulars and ever since plaintiffs were partners under the firm name of F. Vietor & Achelis, and the defendant collector of customs of the port of New York.

That plaintiffs imported at New York certain stockings made wholly of worsted; and also certain stockings made in part of cotton and in part of worsted, of which cotton was chief value, to be worn by men, women, and children, and which were made on frames, upon which defendant, as such collector, liquidated and collected duty at ninety per cent. of fifty cents per pound and thirty-five per cent. ad valorem.

That plaintiffs made due protest and appeal against all of such exaction except that made on the importation by the City of Brooklyn on July 15th, 1874. That the protest made to said exaction by the City of Brooklyn, July 15, 1874, was in the following form:

NEW YORK, *July* 15, 1874.

To the COLLECTOR OF CUSTOMS,
New York:

SIR: We hereby give you notice of dissatisfaction with the ascertainment and liquidation of, or demand for, duties at the rate of
23 ninety per centum of 50 cents per pound and thirty-five per centum ad valorem on certain packages containing hosiery imported by us per st'r City of Brooklyn from Liverpool, and entered on the 15th day of July, 1874.

Because said merchandise, being hosiery and similar articles made on frames, not otherwise provided for, is only liable to duty under the twenty-second section of the tariff act of March 2, 1861, and the thirteenth section of the tariff act of July 14, 1862, at the rate of thirty-five per centum ad valorem (less 10 per. cent. under the second section of the act of June 6, 1872, as manufacturers wholly or in part of wool or hair of the alpaca, goat, or other like animal.)

We submit, under compulsion, to your ascertainment and liquidation, or demand, as aforesaid, and hereby give you notice that we intend this protest to apply to the above described entry, and to all future similar importations by us under the aforesaid tariff acts, and also intend the duplicate protest, herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision on this, and on all such future entries as fully as if formally made on each entry thereof.

Respectfully,

FR. VIETOR & ACHELIS,
By H. J. BEGLY, *Att'y.*

24 That the appeal on the decision of the collector on this exaction was duly taken. That the protests to the other exactions herein are substantially as follows:

NEW YORK, , 187 .

To the COLLECTOR OF CUSTOMS,
New York:

SIR: Notice of dissatisfaction is hereby given you with the ascertainment and liquidation of, or demand for duties, at the rate of ninety per centum of 50 cents per pound, and thirty-five per centum ad valorem on an importation of per str. entered on the day of 187 .

Because said merchandise being embraced within the provision for "caps, gloves, leggins, mitts, socks, stockings, wove shirts, and drawers, and all similar articles made on frames of whatever material composed, except silk and linen, worn by men, women, or children, and not otherwise provided for," mentioned in schedule M, section 2504, title 33, of the Revised Statutes of the United States, passed June 22, 1874, is only liable to duty at the rate of thirty-five per centum ad valorem (less 10 per cent., under section 2503 of said title, as manufactures, wholly or in part of wool or hair of the alpaca, goat, or other like animals.)

25 Your ascertainment and liquidation, or demand as aforesaid, is submitted to, under compulsion, and you are hereby notified that this protest is intended to apply to the above described entry and to all future similar importations, and that the duplicate protest which is herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, is intended to be an appeal to him from your decision on this, and on all such future entries as fully as if formally made on each entry thereof.

Respectfully,

FRED'K VIETOR & ACHELIS,
Per H. J. BEGLY, *Attorney.*

And on the decisions against them by the Secretary of the Treasury brought this suit in due season. That said goods were made on frames, and were also knit goods. That knit goods comprises all goods made on frames, and also all hand-knit stockings, and other knitted articles of various kinds. That the goods in suit were classified for duty by the appraiser as worsted knit goods, costing over eighty cents per pound, which classification was regularly reported to the collector who made his liquidation accordingly. That the goods were all imported since June 22, 1874.

26 It was admitted, on the trial, that if the plaintiffs were entitled to recover, the amounts should be as follows, viz: on worsted

stockings, eight hundred and fifty-six $\frac{55}{100}$ dollars in coin, and one hundred and eighty-six $\frac{18}{100}$ dollars in currency, and on worsted and cotton stockings, cotton chief value, seventy-one $\frac{50}{100}$ dollars in coin and fifteen $\frac{01}{100}$ dollars in currency.

That the duty exacted on the cotton and worsted stockings, cotton chief value, in excess of thirty-five per centum ad valorem was seventy-one $\frac{50}{100}$ dollars, imported per City of Brooklyn, duty paid July 15, 1874; that the remainder of the goods were worsted stockings.

The plaintiffs' evidence being closed the defendant offered no testimony, whereupon the plaintiffs' counsel moved the court to direct the jury to find a verdict for the plaintiffs, which motion the court denied, to which denial and refusal the plaintiffs then and there duly excepted.

The court thereupon, on motion of the defendant's counsel, directed the jury to find a verdict for the defendant, to which direction the plaintiffs then and there duly excepted.

And because none of the said exceptions, so offered and made
27 to the opinion, instructions and decisions of the court do appear upon the record of the said trial, therefore, on the prayer of the said plaintiffs by their counsel, the said judge has signed and sealed this bill of exceptions, nunc pro tunc, as of the twenty-sixth day of October, 1877.

N. SHIPMAN. [L. S.]
Judge.

(Endorsed:) 4192. U. S. circuit court, S. D. N. Y. F. Vietor et al. vs. C. A. Arthur. Bill of exceptions. Hartley & Coleman, pl'ffs' atty's, 51 William st., New York. U. S. circuit court. Filed Dec. 18, 1877. John I. Davenport, clerk.

28 Supreme Court of the United States.

FREDERICK VIETOR, GEORGE F. VIETOR, CARL Vietor, Thomas Vietor, jr., and Fritz Achelis, plaintiff's in error,
vs.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol in Washington, came the said plaintiffs in error by Hartley & Coleman, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants. And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

HARTLEY & COLEMAN,
Attorneys for Plaintiffs in error.

29 (Endorsed:) 4192. U. S. Supreme Court. Fred'k Vietor et al., pl'ffs in error, vs. Chester A. Arthur, d'f't in error. Assignment of error. Hartley & Coleman, att'ys pl'ffs in error. U. S. circuit court. Filed Mar. 6, 1878. John I. Davenport, clerk.

30 *Joinder in error.*

Supreme Court of the United States.

FREDERICK VIETOR, GEORGE F. VIETOR, CARL Vietor, Thomas Vietor, jr., and Fritz Achelis, plaintiffs in error, } 4192.
against
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, 1878, the said Chester A. Arthur, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid. And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEWART L. WOODFORD,
Attorney for Defendant in Error.

(Endorsed:) Supreme Court of the United States. 4192. Frederick Vietor & al., plaintiffs in error, vs. C. A. Arthur, defendant in error. Joinder in error. Stewart L. Woodford, attorney for def't in error.

Service of a copy of the within joinder in error is hereby admitted.
31 New York, Ap'l 26, 1878.

E. HARTLEY,
Counsel for Pl'ff in Error.

U. S. circuit court. Filed Apr. 26, 1878. John I. Davenport, clerk.

32 *Bond for costs.*

Circuit court of the United States of America, for the southern district of New York, in the second circuit.

FREDERICK VIETOR, GEORGE F. VIETOR, CARL Achelis Vietor, Thomas Vietor, junior, and Fritz
vs.
CHESTER A. ARTHUR.

Know all men by these presents, that we, Thomas Bolger, of No. 246 West Fifty-fifth street, in the city of New York, and Robert Pender, of No. 2190 Second avenue, in said city of New York, are held and firmly bound unto the above named Chester A. Arthur in the sum of two hundred & fifty (250) dollars, to be paid to the said Chester A. Arthur, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 26th day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment

rendered in the above entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their appeal on said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THOS. BOLGER. [L. S.]
ROBERT PENDER. [L. S.]

Sealed and delivered and taken and acknowledged this 26th day of Feb'y, 1878, before me.

JOHN A. SHIELDS,
U. S. Commissioner for N. Y.

33 (Indorsed:) 4192. Vol. , page . U. S. circuit court. F. Vietor et als., pl'ff, vs. Chester A. Arthur, d'ft. Bond for costs on writ of error. Hartley & Coleman, pl'ffs' att'ys. U. S. circuit court. Filed March 2, 1878. John I. Davenport, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Thomas Bolger and Robert Pender, being duly sworn, do depose and say, each for himself, that he resides in the southern district of New York, and is a householder therein, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

THOS. BOLGER.
ROBERT PENDER.

Sworn to this 26 day of Feb'y, A. D. 1878, before me.

JOHN A. SHIELDS,
U. S. Commissioner for N. Y.

The foregoing bond is approved as to form and amount and the sufficiency of the sureties.

N. Y., Feb'y 28, 1878.

SAM'L BLATCHFORD.

34 UNITED STATES OF AMERICA, *ss:*

To Chester A. Arthur, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Frederick Vietor, George F. Vietor, Carl Vietor, Thomas Vietor, junior, and Fritz Achelis are plaintiffs in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, this twenty-eighth day of February, in the year one thousand eight hundred and seventy-eight.

SAM'L BLATCHFORD,
Judge.

35 (Indorsed:) 4192. U. S. circuit court. Fred'k Vietor et al., pl'ffs in error, vs. Chester A. Arthur, def't in error. Citation. Hartley & Coleman, att'ys pl'ffs. U. S. circuit court, Mar. 2, 1878. John I. Davenport, clerk.

Due service of a copy of the within citation is hereby admitted this (2d) second day of March, 1878.

STEWART L. WOODFORD,
U. S. Att'y.

(Indorsement on cover:) No. 505. Frederick Vietor, George Vietor, Carl Vietor, Thomas Vietor, jr., & Fritz Achelis, plaintiffs in error, v. Chester A. Arthur, collector of the port of New York. S. New York C. C. U. S. Filed 5th October, 1878.

14491

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

FREDERICK VIETOR ET AL.,
vs.
CHESTER A. ARTHUR,
Collector, &c.

No. 223.

ERROR TO UNITED STATES COURT, SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFFS IN ERROR.

In the Supreme Court.

FREDERICK VIETOR AND OTHERS

vs.

CHESTER A. ARTHUR, COLLECTOR, &c.

No. 223—*Oct. T.*, 1880.

IN ERROR TO THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief in behalf of Plaintiffs in Error.

STATEMENT.

Plaintiffs imported and entered at the Port of New York stockings of worsted, and of worsted and cotton. In those made of worsted and cotton, the cotton was the material of chief value. These stockings were to be worn by men, women and children, and were made on frames. The importations in question were all subsequent to June 22, 1874. Duty was exacted at the rate of fifty cents per pound, and thirty-five per cent. *ad valorem*, under a classification of the goods by the Appraiser, as worsted knit goods.

It further appeared that while said goods were made on frames, they were also knit goods. That knit goods comprise

all goods made on frames, and also all hand-knit stockings, and other knitted articles of various kinds.

The clause of the Revised Statutes, under which the Collector assessed the duty, is as follows :

" Flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound : twenty cents per pound ; valued at above forty cents per pound and not exceeding sixty cents per pound : thirty cents per pound ; valued at above sixty cents per pound and not exceeding eighty cents per pound : forty cents per pound ; valued at above eighty cents per pound : fifty cents per pound ; and, in addition thereto, upon all the above named articles : thirty-five per centum *ad valorem*."

U. S. Rev. Stat., § 2504, Schedule L, page 471, last clause.

The importers, however, claimed the goods to be dutiable under the following clause of the same statute :

"Clothing, ready made, and wearing apparel of every description, of whatever material composed, except wool, silk, and linen, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, not otherwise provided for, caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, except silk and linen, worn by men, women, or children, and not otherwise provided for, articles worn by men, women, or children, of whatever material composed, except silk and linen, made up, or made wholly or in part by hand, not otherwise provided for : thirty five per centum *ad valorem*."

U. S. Rev. Stat., § 2504, Schedule M., p. 474; near bottom.

A further question is raised by the record as to the sufficiency of one of the protests, in case the contention of the plaintiffs as to the dutiable character of their importations is sustained.

This protest will be found on page 8 of the record (fol. 23). It was filed July 15, 1874, after the passage of the Revised Statutes, and instead of referring the Collector to the Revised Statutes, refers to the original Acts of 1861 and 2, from which the provisions under which plaintiffs' claim are incorporated in the Revised Statutes.

Errors Assigned.

The court erred in refusing on the undisputed evidence in the case, to direct a verdict for the plaintiffs.

The court erred in directing the jury to find a verdict for the defendant.

The protest at fol. 23 of the Record is a good and sufficient protest, and the plaintiffs were entitled to a verdict and judgment for the overpayment of duties claimed on the entry covered by such protest.

POINTS.

I.

The plaintiffs' importations were specifically enumerated by name and description as dutiable at thirty-five per cent., as "stockings made on frames."

The statute further enumerates and limits the enumeration as follows:

"Of whatever material composed, except silk and linen, worn by men, women and children."

The case finds the articles in question to be stockings made on frames, composed of worsted, and worsted and cotton, to be worn by men, women and children.

The facts then as to these goods, meet every requirement of the statutory classification.

It is not enough to take them out of this classification to find other general provisions in other parts of the statute broad enough to cover them. The particular enumeration must prevail, and especially when Congress in legislating in respect to duties, has for a long period adopted such particular enumeration; and by so adopting it, has given to such article a distinct and separate existence as an article of dutiable enumeration apart from the large general classification to which it might otherwise belong.

"When Congress has designated an article by a specific name, and by such name imposed a duty upon it, general terms in a subsequent act, or in a later part of the same act, although sufficiently broad to cover such article, are not applicable to it."

Arthur *v.* Lahey, 96 U. S., 113, 118:

"When Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practiced on at the Custom House."

De Forest *v.* Lawrence, 13 How., 274, 282.

We find that as early as 1842 the specific enumeration of *stockings made on frames* appeared in the statutes.

The various statutes are as follows:

"On woollens and worsted mits, gloves, caps, and bindings, and on woollen or worsted hosiery, that is to say, stockings, socks, drawers, shirts, and all other similar manufactures made on frames."

Act of Aug. 30, 1842, 5th Stat. at L., p. 549.

"Caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, worn by men, women, or children, and not otherwise provided for."

Act of July 30, 1846, 9th Stat. at Large, page 44.

"Caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women or children, and not otherwise provided for."

Act of March 2, 1861, 12th Stat. at L., p. 191.

"Caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women and children, and not otherwise provided for."

Act of July 14, 1862, 12th Stat. at L., p. 556.

The construction contended for is in harmony with the decided cases. *See:*

Homer *vs.* The Collector, 1 Wall., 486.
Reiche *vs.* Smythe, 13 Wall., 162.
Movius *vs.* Arthur, 95 U. S., 144.
Bend *vs.* Hoyt, 13 Pet., 263.
U. S. *vs.* Ullman, 4 Ben., 547.
Arthur *vs.* Morrison, 96 U. S., 108.
Arthur *vs.* Lahey, 96 U. S., 112.
Arthur *vs.* Unkart, 96 U. S., 119.
Arthur *vs.* Zimmerman, 96 U. S., 124.
Arthur *vs.* Stephani, 96 U. S., 125.
Arthur *vs.* Davies, 96 U. S., 135.
Arthur *vs.* Rheims, 96 U. S., 143.
De Forest *vs.* Lawrence, 13 How., 274.

Thus in Arthur *vs.* Davies, the court say, 96 U. S., 136: "It thus appears, that for thirty years prior to this importation, and in four different statutes, braces and suspenders, composed wholly or in part of india-rubber had been a subject of duty *eo nomine;* and in the same statute, where a duty of fifty per cent. is imposed on other manufactures, of which rubber is a component material, which it is now sought to apply

to braces and suspenders, braces and suspenders containing that material are, by name, charged with an additional duty of five per cent.

"It is not material that in one kind of suspenders cotton was the component of chief value, and that each contained some proportion of silk. If they are technically and commercially braces and suspenders, composed in part of india-rubber, they take their dutible character from that source, and not from the fact that they would otherwise fall under the general designation applicable to other subjects."

In Solomon *vs.* Arthur decided at the present term, Mr. Justice BRADLEY delivering the opinion of the court said: "It is observable that the description of "manufactures made of mixed materials in part of cotton, silk, &c." is more general than that of "manufactures of which silk is the component material of chief value." "Logically, the two phrases standing together in the same act or system of laws would be related as follows: Goods made of mixed materials, cotton, silk, &c., shall pay a duty of thirty-five per cent.; *but* if silk is the component part of chief value, they shall pay a duty of fifty per cent." So in this case, logically, the two phrases standing together in the same act or system of laws are related as follows: "Knit goods shall pay a duty of fifty cents a pound and thirty-five per cent. *ad valorem*, but if they are "stockings, &c., made on frames" and if "not made of silk or linen," and if "worn by men, women or children," they shall pay "thirty-five per cent. *ad valorem*."

The other cited cases are in entire harmony with the views thus expressed.

The exception in the statute confirms the construction contended for. The provision is for stockings made on frames of whatever material composed "*except silk and linen.*"

This language in its positive import includes all stockings made on frames, except those composed of silk and linen, and the very exception of silk and linen enforces the conclusion that all other materials are included, and other exceptions were not intended. Such must be the conclusion "upon the well known maxim, that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted."

STORY, *J.*, 13 Pet. 271.

II.

The protest given at Page 8, of the Record, is sufficient and comes within the rule laid down in Davies *vs.* Arthur, 96 U. S. 148, 151, and applied in Arthur *vs.* Dodge, 101 U. S. 34, 37, "Technical precision is not required, but the objection must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one that could be obviated."

The collector could not have been misled as to what the importer intended, and it is manifest that the importer had in mind the same objection which he urged at the trial, and which is now urged.

STEPHEN G. CLARKE,
Of Counsel for Plffs. in error.

14-458

OFFICE SUPREME COURT U.S.
FILED
JAN 17 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

VIETOR
v.
ARTHUR. } No. 223.

DEFENDANT'S BRIEF.



In the Supreme Court of the United States.

OCTOBER TERM, 1880.

VIETOR
v.
ARTHUR. } No. 223.

DEFENDANT'S BRIEF.

In 1874, subsequently to June 22, the plaintiff imported into New York, stockings, of which one lot was wholly worsted and the other composed of cotton and worsted mixed, the former being the material of chief value. The goods were all made upon frames, and were intended to be worn by men, women, and children. (Record, 8.) They were knit goods, this term comprising "all goods made on frames, and also all hand-knit stockings and other knitted articles of various kinds." (*Id.*, 9, bottom.)

These articles were classified by the appraiser as worsted knit goods, costing over eighty cents a pound, and the defendant (allowing the ninety per cent. reduction) assessed duty thereon at fifty cents per pound and thirty-five per cent. ad valorem. (Record, 8, 9.)

The importer claimed them to be dutiable as stockings made on frames, worn by men, women, and chil-

dren, *not otherwise provided for*, at thirty-five per cent. ad valorem, with ten per cent. off, under Revised Statutes, section 2504, Schedule M. (*Id.*, 9, middle.)

STATUTES.

This controversy is as to which clause of the revision applies to these goods.

The first schedule (A) of section 2504 of the Revised Statutes relates to cotton, and commences that section, thus:

"SEC. 2504. On all manufactures of cotton, * * * not bleached, colored, stained, painted or printed, and not exceeding one hundred threads to the square inch, *counting the warp and filling*, and exceeding in weight five ounces per square yard, five cents per square yard;" &c., &c. * * * (Revised Statutes, p. 460.)

This schedule concludes: "Cotton shirts and drawers, woven or made on frames, and on all cotton *hosiery*, thirty-five per centum ad valorem; cotton velvet, thirty-five per centum ad valorem; cotton braid, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum ad valorem." (*Id.*, 461.)

Nothing is said of articles of which cotton is one ingredient, whether of chief or inferior value.

The wool schedule (L) of this section, class 3, contains the provision adopted by the collector as applicable to these importations:

"Flannels, blankets, hats of wool, *knit goods*, balmorals, woolen and worsted yarns, *and all manufactures* of every description, *composed wholly* OR IN PART *of worst-*

ed, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool, not otherwise provided for, valued not exceeding forty cents per pound, twenty cents per pound; * * * valued at above eighty cents per pound, fifty cents per pound; and, in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem." (Revised Statutes, pp. 471–2.)

Under the alphabetical arrangement of Schedule M ("SUNDRIES") of this section, the clause deemed by the importer appropriate to his goods is found at the bottom of page 474:

"Clothing, ready-made, and wearing apparel of every description, of whatever material composed, except wool, silk, and linen, made up or manufactured wholly or in part, by the tailor, seamstress, or manufacturer, not otherwise provided for; caps, gloves, leggins, mitts, socks, *stockings*, wove shirts and drawers, *and all similar articles made on frames*, of whatever material composed, except silk and linen, worn by men, women, or children, AND *not otherwise provided for;* articles worn by men, women, or children, of whatever material composed, except silk and linen, made up, or made wholly or in part by hand, not otherwise provided for: thirty-five per centum ad valorem." (Revised Statutes, p. 474, bottom.)

BRIEF.

I.

That the existence of cotton fiber in these importations does not affect the duty to be levied upon them, need hardly be argued; for neither party claimed to have them assessed under the cotton schedule.

That covers only those articles and manufactures made entirely, or so substantially, of that material as to be known as, and to be, cotton goods. It does not reach fabrics of mixed material, of which cotton is only a constituent, however important. (Compare acts of March 2, 1861, § 14, and July 14, 1862, § 10, with that of June 30, 1864, § 6.) They could not come within the general phraseology of that clause, because the language employed in those upon which the parties respectively base their claims is more specific.

Nor did the protest set up this claim; and the importers are restricted by the claim they did then and thereby set forth. (Davies *v.* Arthur, 96 U. S., 148.)

The cotton schedule is referred to in this brief only because it was somehow thought worth while to make the fact of cotton fiber being knit into some of these stockings appear in the record, and to state separately the duty levied upon them. (Record, 8, top.)

II.

These articles were aptly described in Schedule L as knit goods, composed in part of worsted.

They are stockings dutiable *eo nomine* unless "other wise provided for."

To determine whether or not the knit-goods clause is such other and prior provision, we consult the chronology and terms of the statutes, condensed and reproduced in the revision, relating to this subject.

The act of August 30, 1842, ch. 270, § 1, items seventh and ninth, is believed to be the first instance of the adoption by Congress of language similar to that found in the legislation we are considering. It reads thus:

"Seventh. On woolen and worsted mits, gloves, caps, and bindings, and on woolen and worsted hosiery, *that is to say*, stockings, socks, drawers, shirts, and *all other similar manufactures made on frames*, a duty of thirty per centum ad valorem. * * *"

"Ninth. On ready-made clothing, *of whatever materials composed*, worn by men, women, or children, *except* gloves, mits, stockings, socks, wove shirts and drawers, and all other similar manufactures made on frames; hats, bonnets, shoes, boots, and bootees, imported in a state ready to be used as clothing by men, women, or children, made up either by the tailor, manufacturer, or seamstress, an ad valorem duty of fifty per centum; on all articles worn by men, women, or children, other than as above specified or excepted, of whatever material composed, made up wholly or in part by hand, a duty of forty per centum ad valorem." (5 Stats., 549.)

In Schedule C (thirty per centum ad valorem) of the act of July 30, 1846, § 11, we find "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, worn by men, women, or children, and not otherwise provided for," as well as "clothing, ready made, and wearing apparel of every

description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer." (9 Stats., 44–5.)

In the twenty per cent. Schedule, E, were put "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, made on frames, composed *wholly* of cotton, worn by men, women, and children." (*Id.*, 46, bottom.) These duties were reduced by the act of 1857.

The act of March 2, 1861, ch. 68, § 22, imposed a duty of thirty per cent. upon "articles worn by men, women, or children, of whatever material composed, made up, or made wholly or in part by hand, not otherwise provided for"; upon "caps, gloves, leggings, mits, socks, stockings, wove shirts and drawers, and all similar articles, made on frames, of whatever material composed, worn by men, women, or children, and not otherwise provided for"; and also upon "clothing, ready made, and wearing apparel of every description, of whatever material composed, *except wool*, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer." (12 Stats., 191.) The act of June 14, 1862, repeats the phraseology of these three clauses, adding a further duty of five per cent. (*Id.*, 556.) Wool is excepted, because, in an earlier section (13, item second), there is imposed "on woolen cloths, woolen shawls, and *all manufactures of wool* of every description, made wholly or in part of wool, not otherwise provided for, a duty of twelve cents per pound, and in addition thereto twenty-five per centum ad valorem" (*Id.*, 184); and "on clothing, ready made, and wearing apparel of every description, composed wholly or in part of wool, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, twelve cents per pound,

and in addition thereto twenty-five per centum ad valorem" (*Id.*, bottom); which is repeated in the later act, adding specifically six cents a pound, besides the five per centum ad valorem (*Id.*, 553), making the duty eighteen cents a pound and thirty per cent. ad valorem. "Hats of wool" are specially enumerated in these enactments.

Employing the same terms, the act of June 30, 1864, ch. 171, § 5, increases the duty on ready-made clothing and wearing apparel, wholly or in part of wool, "*except hosiery*," to twenty-four cents a pound and forty per cent. ad valorem. (13 Stats., 207, near bottom.) It treats woolen or worsted hosiery as included within the general terms used, but excepts it from their operation, leaving it dutiable under a subsequent clause of the same section, "on shirts, drawers, and hosiery, of wool, or of which wool shall be a component material, not otherwise provided for, twenty cents per pound, and, in addition thereto, thirty per centum ad valorem." (*Id.*, 208.) Except this allusion to "cotton shirts and drawers, woven or made on frames, and on all cotton hosiery, thirty-five per centum ad valorem" (*Id.*, 209), this act seems to make no further provision for articles of wearing apparel.

The act of March 2, 1867, ch. 197, § 2, imposes "on clothing ready made and wearing apparel of every description, and balmoral skirts and skirting, and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other like animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, *except knit goods*, fifty cents per pound,

and, in addition thereto, forty per centum ad valorem." (14 Stats., 561.)

Here, too, it is apparent that, but for the exception, the general terms would have swept into this classification for duty knit goods which were to be worn upon the persons of men, women, or children. The exception, however, left them to be assessed under a preceding clause of the same section, which placed a duty—

"On flannels, blankets, hats of wool, *knit goods*, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly *or in part* of worsted, the hair of the alpaca, goat, or other like animal, (except such as are composed in part of wool) not otherwise provided for, valued at not exceeding forty cents per pound, twenty cents per pound; * * * valued at above eighty cents per pound, fifty cents per pound; and, in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem." (*Ibid.*)

It was under this statute, now embodied in Revised Statutes, section 2504, pages 471, 472, that the collector levied the assessment in controversy.

Construing these clauses of the act of 1867 harmoniously with prior legislation, and in view of the purpose not to change the law by the revision, but only to collate it, the court below felt bound to treat this act of 1867, as reproduced, as the one applicable to this case. (U. S. *v.* Bowen, 100 U. S., 508.) This clause is an ample and appropriate provision for such importations; therefore the phraseology brought from the act of 1864, relating to stockings and all similar articles "*not* otherwise provided for" is not applicable—for these knit goods in part of worsted *were* provided for.

The provision in this act of 1867 for knit goods, partly

worsted, followed, in the same section, by one providing for wearing apparel of every description composed in part of worsted, *except* knit goods—excepted because just before provided for—demonstrates, as we believe, a purpose to except worsted knit articles from the effect of earlier legislation upon the subject of wearing apparel, and to make them dutiable at the rate paid the defendant by the plaintiff. We shall add no more until the plaintiff's counsel presents his views.

EDWIN B. SMITH,
Assistant Attorney-General.

14-501

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 159.

DAVID S. DRAPER, PLAINTIFF IN ERROR,

vs.

THE TOWN OF SPRINGPORT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 8, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 159.

DAVID S. DRAPER, PLAINTIFF IN ERROR,

vs.

THE TOWN OF SPRINGPORT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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1 United States circuit court for the northern district of New York.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT, DEFENDANT.

To the said defendant:

Please to take notice that a declaration in this cause has been filed at the office of the clerk of this court at the city of Utica, in said district, of which a copy is herewith served upon you.

And that you are required, by rule duly entered, to plead to said declaration within 20 days from this service, or judgment, &c.

Dated Auburn, Jan'y 29, 1877.

Yours, &c.,

JAS. R. COX,
Pl'ff's Att'y.

To the TOWN OF SPRINGPORT.

2 United States circuit court, northern district of New York.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

CAYUGA COUNTY, *ss:*

Authur M. Sanders, of Auburn, in said county, being duly sworn, says that on the 29th day of January, 1877, he personally served on George W. Clarke, of Springport, in said county, who is known to deponent to be the supervisor of the said town of Springport, a copy of the annexed declaration in the above cause, together with the usual notice of a rule to plead, of which a copy is on the other side of this sheet , by handing the same to him at Springport aforesaid, on that day, and leaving the same with him.

A. M. SANDERS.

Subscribed & sworn before me this 30th day of January, 1877.

JAMES LYON,
U. S. Commissioner in & for said Dist.

3 United States circuit court.

Pleas in the United States circuit court for the northern district of New York, of October term, 1876, that is to say of the 22d day of January, 1877.

DAVID S. DRAPER, PLAINTIFF,
vs.
THE TOWN OF SPRINGPORT, DEFENDANT.

David S. Draper, a citizen of the State of Massachusetts, plaintiff in this action, by James R. Cox, of Auburn, in said district, his attorney, complains of The Town of Springport, a municipal corporation of the county of Cayuga in said district, by declaration filed, and not by writ, of a plea of trespass upon this case, as follows:

For that whereas heretofore by an act of the legislature of the said

State, entitled "An act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof," duly passed on the 24th
4 day of April, 1869, it was in substance enacted that certain three commissioners might be appointed by the county judge of said county to carry into effect the purposes of said act; and that such commissioners might borrow on the faith and credit of said town (meaning the said defendant) such sum of money as the taxpaying inhabitants of said town should fix upon, by their assent in writing, not exceeding ten per centum of the assessed valuation of the real and personal property of said town, as shown by its assessment roll for the year 1868; and might issue bonds, bearing interest at 7 per cent. per annum, for the amount of said loan, not exceeding 30 years to run, and with liberty to issue said bonds directly to the directors of the said railroad company, in exchange at par for an equal amount of the capital stock of said railroad company at par which Cayuga Lake Railroad Company was duly incorporated under the general laws relating to the formation of railroad companies in the said State of New York, but it was also provided by said act that such loan and bonds should only be executed upon
5 the condition that the consent in writing should first be obtained of a majority of the taxpayers of said town owning more than one-half of the taxable property of said town, assessed and appearing upon the assessment-roll of the year 1868, to be proved or acknowledged as provided in said act, and the proof provided by said act to show such consents should be by the affidavit of the assessors of said town, or a majority of them, executed to that effect, which affidavit should be filed in the clerk's office of said county of Cayuga and of said town of Springport.

And it was further thereby enacted that said commissioners might subscribe for and in the corporate name of the said defendant might purchase, and with the said bonds of said town might pay for the stock of the said railroad company to the amount indicated by such assents not exceeding the said ten per cent.; and might receive the usual certificates representing such stock, and that said town, acting by such commissioners, might thereupon acquire and exercise all the rights and privileges as in the case of other stockholders of said railroad
6 company.

And thereupon, afterwards, the said county judge, in pursuance of said act, on or about the 13th day of May, 1869, did duly appoint, under his hand and seal, three resident freeholders of the said town of Springport, that is to say, Albert Beardsley, Smith Anthony, and John C. Yawger, commissioners under said act, who thereupon duly took the usual oath of office and accepted the said appointment, and were duly qualified under and in accordance with the provisions of the said act.

And thereupon, afterwards, the consents of the said requisite majority of the taxpayers aforesaid, representing and owning a majority of the property as aforesaid, were duly executed and obtained, in conformity with the provisions of the said act, consenting to a loan of the credit of the said town to the amount of $100,000 under the said act in aid of the said The Cayuga Lake Railroad Company, and to issue the bonds of the said town therefor in exchange for the stock of said company; and thereupon afterward, and on or about the 23d day of March,
7 1871, the said assessors of said town duly executed their affidavit as contemplated by said act, to the effect that such majority of the tax-payers of said town, owning more than one-half of the real and personal property thereof, appearing and assessed upon the said assessment

roll of said town for the year 1868, as contemplated by the said act, had duly given their consent as aforesaid in writing duly proved and acknowledged for the issuing of the bonds of the said Town of Springport under the said act to the amount of $100,000, as fixed upon by the said written consents, being less than ten per cent. as aforesaid; which affidavits were duly executed in duplicate by the said assessors, and filed in the offices respectively of the clerk of the county of Cayuga at Auburn and of the clerk of the said Town of Springport, together with the said written consents, on the 23d day of March, 1871.

And the plaintiff further says, that afterwards, and on or about the month of August, 1871, the said commissioners, in pursuance of the said statute, did subscribe in the name and behalf of the said Town of Springport, defendant, as aforesaid, in due and proper form for 1,000
8 shares of the capital stock of said railroad company, at the par value of $100 per share; and they thereupon duly made and executed under their hands and seals in the name and behalf of the said defendant, and issued to the directors of the said railroad company, directly in payment for said stock, certain bonds of the said Town of Springport, defendant, to the amount in all of $100,000; which bonds were for different amounts, that is to say, 100 of them were for $500 each, 150 of them were for $200 each, and 200 of them were for $100 each; all having not over 30 years to run, and bearing interest at seven per cent. per annum, semi-annually, with coupons or interest warrants appropriate to each bond respectively, payable semi-annually, that is to say, on the 1st day of March and September in each year.

And the said Town of Springport, defendant, did thereupon, by its said commissioners aforesaid, receive from the said railroad company at par the usual stock certificates or scrip for one hundred thousand dollars of the capital stock of said railroad company, at the par value of
9, 10 $100 per share, constituting the said Town of Springport, defendant, a stockholder in the said company and entitled thereby to all the rights and privileges accruing or to accrue from that relation and ownership, according to the said act; which stock in said company has ever since that time been, and still is, owned and held by the said defendant.

And afterwards, and in or about the month of September, 1871, the said railroad company duly sold and transferred all of the said bonds for cash, in the city of New York, to divers purchasers for value, together with the said coupons or interest-warrants attached to and accompanying the said bonds; and afterwards a quantity of said coupons came into the hands of this plaintiff for a valuable consideration by him duly paid; and he is now the lawful holder and owner of the same; copies of which are hereinafter set forth, as follows:

11 The said plaintiff, for a 1st cause of action, states to the court that on or about the 11th day of August, 1871, the said defendant being a municipal corporation as aforesaid, duly organized under the laws of the State of New York, executed and delivered in connection with one of said bonds a negotiable instrument in writing, commonly called a coupon, of which the following is a copy:

$7. The Town of Springport, county of Cayuga, will pay the bearer hereof at the Tenth National Bank of New York, in the city of New York, on the 1st day of March, 1873, the sum of seven dollars for six months, interest then due on bond No. 2.

(Signed) A. BEARDSLEY,
Commissioner.

That said instrument in writing was duly presented to said Tenth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do; whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of seven dollars, with interest from the first day of March, 1873.*

(* Here follow 1,225 other causes of action in all respects similar in form to the foregoing, excepting as to the amounts, dates, and maturity of the coupons on said bonds, from 1873 to 1876, amounting in all without interest to the sum of $6,128.50.

As no separate question arises upon either of these coupons, it is unnecessary to print them.

Either party is at liberty to refer to the original record on file for any particulars as to these causes of action or coupons.)

325 Wherefore the said plaintiff brings here into this court the said coupons, and tenders the same to the said defendants, and demands judgment against the said defendants for the sum of ten thousand dollars, besides the costs and disbursements of this action.

Auburn, January 25, 1877.

JAS. R. COX,
Pl'ff's Att'y.

326 (Endorsed:) United States circuit court, north. dist. of N. Y. David S. Draper vs. The Town of Springport. Narr. Jas. R. Cox, pl'ff's att'y. Auburn, N. Y. Filed Jan'y 31, 1877.

327 United States circuit court, northern district of New York.

DAVID S. DRAPER, PLAINTIFF,
vs.
THE TOWN OF SPRINGPORT, DEFENDANT.

The defendant answers the declaration herein, and saith as follows:

The said defendant denies each and every allegation in said declaration, except as hereinafter admitted, viz:

It admits that it, the said defendant, is a municipal corporation.

Second. And for a second and different defense to the several matters and causes of action in said declaration contained this defendant saith that sufficient consents were not obtained under the act of 1869 in said declaration referred to, nor were sufficient consents obtained under the act of 1871 in said declaration referred to, to comply with the provisions of either statute, and that therefore the said assessors in said
328 declaration named had no jurisdiction to make the affidavit referred to in said declaration.

And this defendant says that the consents herein referred to are the consents named or referred to in said declaration, and denies that the same were sufficient.

And this defendant saith that on or about April 24, 1869, the legislature of the State of New York duly enacted a law or statute entitled "An act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof," being chapter 314 of the session laws of 1869, whereby it was, among other things, enacted that upon the proceedings

being had prescribed in said act the county judge of said county should appoint not more than three freeholders, residents of the county, to be commissioners of the said town, for the purpose of carrying into effect the provisions of said act.

And it was further enacted that it should be lawful for said commissioners to borrow, on the faith and credit of said town, such sum of money as the tax-paying inhabitants thereof should fix upon by
329 their assent in writing, not exceeding the amount therein stated, and to execute bonds therefor under their hands and seals.

It was, however, further enacted that the power so conferred upon said commissioners should not be exercised until the consent in writing should be obtained of the majority of said tax-payers owning more than one-half of the taxable property of said town, assessed and appearing upon the assessment-roll of the year 1868, which consent should be proved or acknowledged as therein provided; and it was also provided and made a condition of the exercise of such power that such consent should be obtained on or before the first of January, 1870.

And it was by said act further enacted that the proof required to show such consent had been given should be by affidavit of the assessors of said town, or a majority of them. And it was also enacted that said affidavit, consent, and proof should be filed in the town and county clerk's offices of said county, with a copy of the assessment-roll of the year 1868.

330 And this defendant further states that Smith Anthony, John C. Yawger, and Albert Beardsley were appointed said commissioners, but the necessary consents were not obtained within the time limited by said act as aforesaid; and, therefore, said act, as this defendant is advised and insists, ceased to be operative and became of no effect.

But this defendant further states that on the 7th of April, 1870, the legislature of the State of New York passed an act entitled "An act to amend an act entitled 'An act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof'; passed April twenty-fourth, eighteen hundred and sixty-nine," being chapter 152 of the laws of 1870; by which it was enacted that the time within which such consents might be obtained was extended to the first day of April, 1871.

And this defendant further says, that the necessary number of consents was not obtained within the time specified for that purpose by the act last aforesaid.

331 And this defendant further says that some consents were obtained in the year 1869, and on the 22d day of December, 1869, were submitted to the assessors of said town then in office, viz, Messrs. Allen, Eldridge, and Schenck, who met together as a board and took cognizance of the matter, and examined said consents, proofs, and assessment-roll of 1868, and considered the same, and adjudged that they did not comprise the consents of a majority of said tax-paying inhabitants, and refused to make the affidavit required by said act; that thereafter, and in 1870, a few consents were obtained, but not of a majority, as required by said act, and these consents with those previously rejected as aforesaid (none of which had been renewed by any taxpayer) were presented to the assessors on the 4th day of May, 1870, and the same were considered and adjudged insufficient, and the said assessors refused to make the affidavit required by said act.

And this defendant says that afterwards, and prior to March 23d, 1871, a few other consents were obtained, but not enough to con-

332 stitute a majority, as required by said act; and these, with the consents obtained in 1869, were presented to the assessors of said town for their consideration, at a meeting held by them on that day.

And this defendant saith that prior thereto, and before the said assessors passed upon the sufficiency of said consents, and before the making of the affidavit hereinafter referred to, a large number of the tax-payers who had before consented, and whose consents were among those presented to said assessors, did, by an instrument in writing, signed and acknowledged by them, revoke the consents so given by them as aforesaid; and such revocation was served upon said assessors before they adjudicated upon said consents, and before they made the affidavit hereinafter referred to. And this defendant saith that the number of such revocations was so great as to reduce the number of consents greatly below the requisite number; and the amount of property represented by the consents was less than one-half of the taxable property appearing upon the assessment-roll of 1868 by an amount of more than twenty thousand dollars ($20,000).

333 And this defendant further states that the majority of said assessors entirely disregarded said revocations, and counted the names of persons who had revoked their consents, and also counted the consents obtained in 1869 and 1870, and thereupon made and filed an affidavit in the form prescribed in the statute, as proof that a majority of the taxable inhabitants, representing a majority of the taxable property of the said town, had given their consent, as required by said act, as a condition to the issuing of the bonds of said town; and said affidavit, consents, and proofs, and assessment roll were filed in the town and county clerk's office, as required by said statute.

And this defendant further states that immediately thereafter, and on the 3d day of April, 1871, and before any bonds were issued by said commissioners, or any money borrowed by them on the faith and credit of said town, and before any act had been done by them on the faith of said affidavit so made by said assessors, a common law writ of

334 certiorari was sued out of the supreme court of this State, by the people, on the relation of Philip B. Yawger, addressed to the said assessors of the said town, to the said railroad commissioners, to the clerk of the county of Cayuga, and to the clerk of the town of Springport, whereby the said assessors, commissioners, and clerks were commanded to return the several proceedings and records aforesaid to the said supreme court.

And this defendant further saith, that the writ was immediately, and before any act or thing had been done by the said commissioners on the strength of said affidavit or in consequence of it, and before the bonds or any of them hereinafter named had been issued, served on said commissioners, assessors, and clerks; that said proceedings and records were, in pursuance of said writ, returned unto the supreme court, and thence, by appeal, to the court of appeals of the State of New York, by which court the said proceedings of the said assessors in adjudicating that said consents were sufficient and in making said affi-

335 davit were reversed and annulled; and thereupon it was by said supreme court adjudged and determined that said proceedings of said assessors be reversed and annulled, and held for naught, as by the record thereof now in the office of the clerk of *of* the county of Cayuga, and to which reference is had, will more fully and at large appear.

And this defendant further states that while said proceedings were pending and undetermined, and after the return had been made to the

said writ, and after the same had been served upon them, and after the 1st of June, 1871, but at what precise time defendant cannot state, the said commissioners issued to the said Cayuga Lake Railroad Company, or to some person in its behalf, a large number of bonds or instruments in writing purporting to be the bonds of the town of Springport aforesaid, amounting, as defendant is informed and believes, to about the sum of one hundred thousand dollars ($100,000), payable to bearer and bearing interest at the rate of seven per cent. per annum; said bonds being of different sums and amounts. But none of said bonds
336 were issued pursuant to the acts above referred to, nor were they in the form prescribed thereby, in that none of the said bonds were under seal, or under the seals of said commissioners, or either or any of them, when issued.

And this defendant is informed and believes that the bonds in the said declaration referred to are some of the same bonds hereinbefore stated, and the coupons stated and referred to are the coupons belonging to said bonds, and that the said bonds and coupons are and always have been void.

Wherefore this defendant insists that said plaintiff ought not to have or maintain this action.

Feb. 26, 1877.

ETSEL WOOD,
Defendant's Attorney, Union Springs, N. Y.

337

338 (Endorsed:) U. S. circuit court, north'n dis't N. Y. David S. Draper vs. The Town of Springport. Answer. Etsel Wood, def't's att'y, Union Springs, N. Y. Filed March 3, 1877.

339 *Order for judgment.*

United States circuit court, northern dist. of New York, of October term, 1877.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT. } Dec. 17, 1877.

This cause having been reached in regular call, and moved for trial, both parties present with their counsel, a jury trial being waived by stipulation in writing, the issues herein are tried by the court.

And after hearing the evidence, and Mr. J. R. Cox, of counsel for plaintiff, and Mr. J. F. Danforth, for defendants,

I find that the causes of action in said complaint are unproven, and that the defendant is entitled to judgment, and plaintiff take nothing by his declaration, and the same is hereby dismissed with costs.

Judgment ordered accordingly.

WM. J. WALLACE,
U. S. Dist. Judge.

340 (Endorsed:) United States circuit court. Draper vs. Town of Springport. Order for judgment. Filed Feb. 21, 1878.

341 *Judgment.*

United States circuit court, northern district of New York.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

This cause having been reached in regular call, and moved for trial, at the October term of said circuit court, held at Albany, on the ninth day of October, A. D. 1877, before honorable William J. Wallace, judge presiding, and a jury trial having been waived by stipulation in writing of counsel for the respective parties, and the issues herein having been tried by the court;

And the court having filed its finding, and having ordered that the declaration in this case be dismissed with costs; and the costs of the defendant having been taxed at six hundred and fifty-eight dollars and ninety cents:

Now, on motion of Etsel Wood, defendant's attorney, it is ordered and adjudged that the defendant, The Town of Springport, do recover of the plaintiff, David S. Draper, the said sum of six hundred
342 and fifty-eight dollars and ninety cents for his costs in this suit as taxed.

And the said plaintiff in mercy, &c.

Judgment signed this 23d day of February, A. D. 1878.

CHARLES MASON, *Clerk.*

(Indorsed:) U. S. circuit court, north. dist. of N. Y. David S. Draper vs. The Town of Springport. Judgment record. Etsel Wood, def't's att'y. Taxed costs, $658.90. Filed February 23, 1878, 12 o'clock m.

343 At a stated term of the United States circuit court for the northern district of New York, at the court-house in the city of Albany, on the 9th day of October, 1877; present, hon'l Wm. J. Wallace, district judge.

Order.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

This cause being regularly called in its place on the calendar for trial, and an application for postponement being made by plaintiff, which was resisted by defendants, after hearing Mr. Cox for the plaintiff, and Mr. Danforth for defendants, and both parties consenting thereto, and to the waiver of a jury trial, it is ordered that the further hearing and trial of this cause be set down for some day in December next, to be appointed by Judge Wallace, at his chambers in the city of Syracuse.

Stipulation.

344 United States circuit court, northern dist. of N. Y.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

This cause being now called for trial, pursuant to the former order

made in this cause, it is hereby stipulated that the same be tried by and before hon'l W. J. Wallace, dist. judge, without a jury, the trial by jury being expressly waived.

Syracuse, Dec. 17th, 1877.

JAS. R. COX,
Plaintiff's Att'y.
E. WOOD,
Att'y for Def't.

United States circuit court, northern dist. of New York.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

345 This cause being brought on for trial pursuant to the order heretofore made in this case, on the day appointed by the judge, viz, the 17th day of December, 1877, the parties appeared, plaintiff by Mr. J. R. Cox, his attorney, and defendants by Mr. E. Wood and Mr. Danforth, their att'y and counsel.

And a jury trial being expressly waived by stipulation in writing, and rule entered thereupon, the plaintiff offered in evidence certified copies of the following:

1. The application of freeholders to the county judge of Cayuga County under the act of the legislature (chap. 314 of acts of 1869, copy annexed, marked Exhibit 1).

2. The appointment of commissioners by said judge thereupon, with their oaths of office. Dated May 7th, 1869. Filed May 8th, 1869.

3. The affidavit of assessors, Charles H. Adams and Lewis Ludlow, with the certificate of the county clerk of Cayuga County showing the foregoing exhibits to have been duly filed in his office at
346 Auburn 23d day of March, 1871.

Copy of which affidavit is annexed, marked Exhibit No. 2.

Yawger.

Plaintiff's counsel then called as a witness JOHN C. YAWGER, who being duly sworn testified as follows:

I reside in Cayuga County, N. Y., in the town of Springport, and have lived there for about 50 years; am 57 years of age. I was one of the three commissioners described in the appointment by the county judge of Cayuga County in 1869; the other two were Albert Beardsley and Smith Anthony; these two are both deceased; they died about 1872. I knew them both well, and am acquainted with their handwriting and signatures. In 1871 we subscribed for the stock of the Cayuga Lake Railroad Co. one thousand shares of $100 each, and issued bonds of the town in payment of the same, with semi-annual interest coupons attached to the bonds.

347 Some of the bonds were for $500 each, some for $200 each, and some for $100 each; total amount of the bonds $100,000, all in the same form.

One of the said bonds being here exhibited to the witness, he identified the same, and a copy thereof is found in the bill of exceptions hereto annexed, marked Exhibit No. 6.

No other bonds or coupons were ever issued by the town of Springport.

Counsel for plaintiff produced and exhibited to the witness certain coupons as follows: 525 coupons each $7=$3,675; 701 coupons each $350=$2,453.50, as set forth in the declarations.

The witness proceeded.

These coupons are genuine, and were attached to the bonds we issued; they bear, some of them, the signature of Mr. Beardsley, some of Mr. Anthony, and some my own.

We have never made any provision at the bank for their payment. We received the stock of the railroad company, and have retained it ever since.

348 The railroad was built in 1871, 1872, and has been running ever since from Cayuga to Ithaca. These bonds were delivered by us to the R. R. Co. in August, 1871. Mr. Delafield was the treasurer of that company.

Cross-examined, he further testified:

None of these bonds had any seals when issued, nor put on since to my knowledge. My attention was not called to subject of the seals, nor any conversation ever on the subject with the other commissioners until August, 1875, at the trial in Auburn.

The testimony of WILLIAM A. WILLIAMS, of New York City, taken on a former occasion, was read by agreement, viz:

These bonds were between the 22d of August and 7th September, 1871, sent by the said railroad company to a firm of brokers in the city of New York for sale; they were sold and the proceeds paid to the railroad company.

349 Plaintiff called TALLMADGE DELAFIELD, who, being duly sworn, testified as follows:

I reside in Aurora, New York, and was treasurer of the C. L. R. R. Co.; I received these bonds in August, 1871, from the commissioners, or one of them, Mr. Beardsley, cashier of the bank, and issued the scrip of the R. R. Co. stock to the same amount of $100,000 to the commissioners for the town of Springport, all in August, 1871. Nothing was said about seals when I received the bonds from Mr. Beardsley; I did not notice the omission; took the bonds all to New York City and deposited them with our bankers, Leonard, Shelden & Foster, No. 10 Wall street, for sale. We were preparing for rights of way and surveying to construct the road; we drew on Leonard, S. & F. from time to time as fast or faster than these bonds were sold; we received accounts of sales of these bonds from them about Oct.; all the coupons were attached to them when I took them there (examines the coupons). I think
350 these coupons are the same attached to those bonds.

The avails of these bonds, as treasurer, I received were about $90,000, and were all used in constructing the road. More than that sum was used in the town of Springport.

Road commenced running in 1872 and has continued ever since.

JAMES R. COX, sworn for plaintiff, offers in evidence chap. 314 of acts of 1869 of Laws of New York, and chap. 152 of 1870, copies of which (so far as they affect the questions herein involved) are annexed, marked Exhibit 1.

He made a computation of the interest on these coupons since maturity to this day:

1,226 coupons, in all	$6,128 50
Interest to date	1,413 27
Total due this day	$7,541 77

The plaintiff, Mr. Draper, resides at Great Barrington, Massachusetts; I received these coupons from him for collection.

And the plaintiff thereupon rested his case.

351 And thereupon, having heard the arguments of the parties by their counsel and their various requests to rule and to hold, the court decided against the plaintiff that he take nothing by his said complaint or declaration, on the ground hereinafter in the annexed bill of exceptions appearing, for the lack of seals upon the said bonds, and judgment was ordered for defendant; to all which the plaintiffs, by his said counsel, in due time and form excepted.

JAS. R. COX,
Pl'ff's Att'y.
ETSEL WOOD,
Att'y for Def't.

Special findings of fact and bill of exceptions.

United States circuit court, northern district of New York, October term, 1877.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

352 This cause having been tried before the undersigned district judge of said district, and a jury trial being expressly waived, the following facts were proven or conceded at the trial by the parties:

The plaintiff is a citizen of the United States, residing in the State of Massachusetts, and the defendants are a municipal corporation in the county of Cayuga, in the northern district of New York.

The legislature of the State of New York passed an act on the 24th day of April, 1869, (chap. 314 of the laws of 1869,) and a further act on the 7th day of April, 1870, (chap. 152 of the laws of 1870, amending the former act,) entitled "An act to facilitate the construction of the Cayuga Lake Railroad and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof;" copies of which are hereto annexed marked Exhibit No. 1, to which acts reference is hereby especially intended, authorizing certain proceedings to be taken look-

353 ing to the issue of certain bonds with coupons attached in aid of the "Cayuga Lake Railroad Company," and provided for the appointment by the county judge of Cayuga County of three resident freeholders of the town of Springport as commissioners to carry into effect the purpose of the act, and to subscribe for the stock of the said railroad company, and to pay for the same in the bonds and coupons to be issued. Under this act the county judge duly appointed John C. Yawger, Albert Beardsley, and Smith Anthony such commissioners, and they respectively qualified for the office.

On the 23d day of March, 1871, the affidavits of two of the three assessors of the said town showing a compliance with the conditions required by the said act were duly executed and filed in the proper office at Auburn. (Copy annexed, Exhibit 2.)

On or about the 7th day of April, 1871, certain proceedings by common law certiorari instituted by P. H. Yawger, a taxpayer of said

354 town, were taken with a view of reviewing the proceedings of the said assessors; the writ of certiorari was directed to the said assessors, the town clerk of said town, and the county clerk of the said

Counsel for plaintiff produced and exhibited to the witness certain coupons as follows: 525 coupons each $7=$3,675; 701 coupons each $350=$2,453.50, as set forth in the declarations.

The witness proceeded.

These coupons are genuine, and were attached to the bonds we issued; they bear, some of them, the signature of Mr. Beardsley, some of Mr. Anthony, and some my own.

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Cross-examined, he further testified:

None of these bonds had any seals when issued, nor put on since to my knowledge. My attention was not called to subject of the seals, nor any conversation ever on the subject with the other commissioners until August, 1875, at the trial in Auburn.

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349 Plaintiff called TALLMADGE DELAFIELD, who, being duly sworn, testified as follows:

I reside in Aurora, New York, and was treasurer of the C. L. R. R. Co.; I received these bonds in August, 1871, from the commissioners, or one of them, Mr. Beardsley, cashier of the bank, and issued the scrip of the R. R. Co. stock to the same amount of $100,000 to the commissioners for the town of Springport, all in August, 1871. Nothing was said about seals when I received the bonds from Mr. Beardsley; I did not notice the omission; took the bonds all to New York City and deposited them with our bankers, Leonard, Shelden & Foster, No. 10 Wall street, for sale. We were preparing for rights of way and surveying to construct the road; we drew on Leonard, S. & F. from time to time as fast or faster than these bonds were sold; we received accounts of sales of these bonds from them about Oct.; all the coupons were attached to them when I took them there (examines the coupons). I think

350 these coupons are the same attached to those bonds.

The avails of these bonds, as treasurer, I received were about $90,000, and were all used in constructing the road. More than that sum was used in the town of Springport.

Road commenced running in 1872 and has continued ever since.

JAMES R. COX, sworn for plaintiff, offers in evidence chap. 314 of acts of 1869 of Laws of New York, and chap. 152 of 1870, copies of which (so far as they affect the questions herein involved) are annexed, marked Exhibit 1.

He made a computation of the interest on these coupons since maturity to this day:

1,226 coupons, in all	$6,128 50
Interest to date	1,413 27
Total due this day	$7,541 77

The plaintiff, Mr. Draper, resides at Great Barrington, Massachusetts; I received these coupons from him for collection.

And the plaintiff thereupon rested his case.

351 And thereupon, having heard the arguments of the parties by their counsel and their various requests to rule and to hold, the court decided against the plaintiff that he take nothing by his said complaint or declaration, on the ground hereinafter in the annexed bill of exceptions appearing, for the lack of seals upon the said bonds, and judgment was ordered for defendant; to all which the plaintiffs, by his said counsel, in due time and form excepted.

JAS. R. COX,
Pl'ff's Att'y.
ETSEL WOOD,
Att'y for Def't.

Special findings of fact and bill of exceptions.

United States circuit court, northern district of New York, October term, 1877.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

352 This cause having been tried before the undersigned district judge of said district, and a jury trial being expressly waived, the following facts were proven or conceded at the trial by the parties:

The plaintiff is a citizen of the United States, residing in the State of Massachusetts, and the defendants are a municipal corporation in the county of Cayuga, in the northern district of New York.

The legislature of the State of New York passed an act on the 24th day of April, 1869, (chap. 314 of the laws of 1869,) and a further act on the 7th day of April, 1870, (chap. 152 of the laws of 1870, amending the former act,) entitled "An act to facilitate the construction of the Cayuga Lake Railroad and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof;" copies of which are hereto annexed marked Exhibit No. 1, to which acts reference is hereby especially intended, authorizing certain proceedings to be taken look-

353 ing to the issue of certain bonds with coupons attached in aid of the "Cayuga Lake Railroad Company," and provided for the appointment by the county judge of Cayuga County of three resident freeholders of the town of Springport as commissioners to carry into effect the purpose of the act, and to subscribe for the stock of the said railroad company, and to pay for the same in the bonds and coupons to be issued. Under this act the county judge duly appointed John C. Yawger, Albert Beardsley, and Smith Anthony such commissioners, and they respectively qualified for the office.

On the 23d day of March, 1871, the affidavits of two of the three assessors of the said town showing a compliance with the conditions required by the said act were duly executed and filed in the proper office at Auburn. (Copy annexed, Exhibit 2.)

On or about the 7th day of April, 1871, certain proceedings by common law certiorari instituted by P. H. Yawger, a taxpayer of said

354 town, were taken with a view of reviewing the proceedings of the said assessors; the writ of certiorari was directed to the said assessors, the town clerk of said town, and the county clerk of the said

county and to said commissioners, commanding all of them to return into the supreme court of the State all their proceedings and records.

To this writ a return was duly made by two of the assessors (the same who made the said affidavits of March 23d, 1871), and a further and dissenting return by the third assessor, one Ethan Allen; these returns were made and properly filed on or about the 15th day of December, 1871.

This writ of common law certiorari was not accompanied by any stay of proceedings, unless itself a stay as against any officer in terms.

This certiorari was returnable to the general term of the 4th department of the supreme court, which, after argument in due form, on the 28th day of September, 1872, affirmed the action and conclusion of the said assessors.

From this decision the said relator P. H. Yawger took an ap-
355 peal to the court of appeals of the State, which, after argument, on or about the 6th day of May, 1873, duly reversed the judgment of the supreme court and proceedings of assessors and commissioners, Exhibits 4 and 5, hereto annexed, containing the decisions of both of said courts.

To the exception in evidence of the said certiorari, the returns thereto, and the said decisions of those courts thereupon, the plaintiff in due time and form objected that the same were the irrelevant acts of other parties; which objections were sustained, the said proceedings were not received nor considered in evidence, and to that ruling the said defendants in due time and form excepted.

On or about the first day of August, 1871, the said three commissioners subscribed for $100,000 of the capital stock of the said railroad company, and issued an equal amount of bonds (so called) with interest coupons or warrants annexed for the payment of semi-annual interest, reckoned from the first day of September, 1871, to the full amount
356 of $100,000, and delivered the same to the officers of the said railroad company in payment for the said stock; and they received the usual certificates of $100,000 of said stock upon delivering the said bonds.

Both the said commissioners and the officers of the said railroad company knew that the said writ of certiorari had been issued and served.

The bonds and coupons so issued were for different sums; some for $500, some for $200, and some for $100, and were in the following form.

EXHIBIT No. 6.

UNITED STATES OF AMERICA.

$200] STATE OF NEW YORK. [$200

(Vignette.)

TOWN OF SPRINGPORT, *County of Cayuga:*

Issued by virtue of an act of the legislature of the State of New York entitled "An act to facilitate the constitution of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof," passed April 24th, 1869.

357 This act authorizes the town of Springport, in the county of Cayuga, to subscribe to the stock of the Cayuga Lake Railroad Co., and to issue town bonds in payment therefor.

The whole amount of the bonds to be issued in pursuance of said act is $100,000.

Know all men by these presents that we, the undersigned commissioners under the above-entitled act for the town of Springport, in the county of Cayuga and State of New York, upon the faith and credit and in behalf of said town, for value received, promise to pay to the bearer the sum of two hundred dollars on the first day of March, in the year one thousand nine hundred and one (1901), at the 10th National Bank of New York, in the city of New York, with the interest at seven per cent. per annum from and after September first, 1871, payable semi-annually on the first days of March and September in each year, at the same place, on the presentation and surrender of the coupons for such interest hereto annexed.

358 In witness whereof we have hereunto set our hands and seals, and have caused the coupons hereto annexed to be signed by A. Beardsley, one of our number, this first day of June, in the year one thousand eight hundred and seventy-one.

(Signed) A. BEARDSLEY,
J. C. YAWGER,
SMITH ANTHONY,
Commissioners.

But there was no seal of the said town in existence, and no seals were placed on said bonds to the signatures of the said commissioners.

Two of said commissioners, Mess's Beardsley and Anthony, died about 1873, and but one, Mr. Yawger, is living, and was examined as a witness at the trial.

As to him, his attention was not called at the time to the matter of the seals, and the omission was inadvertant and unintended. He does not know that the attention of the deceased commissioners was ever called to the matter of seals.

359 These bonds were issued, delivered, and received entirely without seals, in fact, either of the town or of the commissioners or either of them. Annexed to each of said bonds were in all 59 coupons, numbered from 1 to 59, for the payment of semi-annual interest, the first for 6 months' interest, from Sept. 1, 1871, payable March 1st, 1872, the second for 6 months' interest, payable Sept. 1, 1872, and so on semi-annually, No. 59 being for the last 6 months' interest, payable with the bond March 1st, 1901.

The following is a copy of one of said coupons:

$7. The town of Springport, county of Cayuga, will pay the bearer hereof at the Tenth National Bank of New York, in the city of New York, on the first day of March, 1873, the sum of seven dollars for six months' interest then due on bond No. 2.
$7.]

A. BEARDSLEY,
Commissioner.

360 These bonds and coupons were taken by the treasurer of the said railroad co. to New York and deposited there with a banking-house in Wall street for sale in August, 1871.

During that month and September, 1871, they were sold by the bankers for cash, realizing for the railroad company about the sum of $90,000, which was used by them in constructing their railroad, which railroad was finished in 1872 and has been in operation ever since. No

provision was made by the defendant at any time to provide funds to meet the coupons at the place where payable.

Prior to the commencement of this action the plaintiff in the ordinary course of business, for value paid, came to the ownership and holding of certain of the said coupons, in all 1,226 in number, of the aggregate value of $6,128.50 (six thousand one hundred and twenty-eight $\frac{50}{100}$ dollars), and the interest upon which, from the dates of their respective maturity, to December 17th, 1877, the day of trial, of $1,413.37,
361 making in all the sum of seven thousand five hundred and forty-one dollars and $\frac{77}{100}$, and this action was brought to embrace the collection of the same. The said coupons were duly produced in evidence at the trial and offered to be surrendered.

The defendants offered to show that the original consents were not sufficient, either in form or in number, to confer the requisite authority upon the said assessors to make the affidavits of March 23rd, 1871, aforesaid.

The plaintiff objected to the proofs offered as irrevelant, inadmissable and incompetent, the plaintiff having no knowledge thereof when he bought the coupons.

The objection was sustained, the evidence was excluded, and defendants in due time and form excepted to said decision.

Defendants offered also to show that on or about the 22d day of December, 1869, the consents obtained up to that date were exhibited and submitted for decision to the board of assessors—met for that
362 purpose—and passed upon by them, holding them insufficient under the statute. A similar application was made on the 4th day of May, 1870, with the consents up to that time obtained, and on each occasion the assessors refused to make the affidavit required by the act.

Subsequently, on March 23d, 1871, the same consents, with others (a few others, insufficient of themselves without counting the former), were exhibited and submitted, whereupon the assessors made the affidavit in question, refusing to estimate or to consider certain revocations of some of said consents in due form, which, had they been considered, would have rendered the majority below the statuatory requirements.

These revocations were served upon said assessors before the adjudication or the making of the affidavit in question.

The plaintiff objected to this evidence that it was incompetent and inadmissible. The court sustained the objection and rejected the evidence, to which the said defendants then and there excepted.

363 Thereupon the defendants duly prayed the court to rule and hold, that the bonds aforesaid having been issued without any seals whatever, were and are for that reason void, and of no obligation; and that the coupons produced in evidence, being cut from the said bonds, were also for that reason void and of no effect.

And thereupon the said court so ruled and held, and decided that the said coupons produced in evidence were and are void and of no effect, for the reason that the said bonds to which they were originally annexed were and are void for the lack of seals.

And plaintiff's counsel then and there duly excepted to such decision, and prayed the court to rule and hold that the plaintiff was duly entitled to judgment for the said sum of $7,541.77.

But the court then and there declined and refused so to hold; and the plaintiff, by his counsel, in due time and form, excepted to such refusal.

364 And thereupon the said court ordered judgment for the de-

fendants for the dismissal of the said declaration or complaint of the plaintiff, with costs to said defendants; to which the plaintiff, by his counsel, then and there, in due time and form, excepted.

And because none of the said rulings and exceptions appear in the record, &c. The judge of the said court who tried this case hath hereto set his hand and seal this seventeenth day of December, 1877.

WM. J. WALLACE, [L. S.]
U. S. Dist. Judge.

EXHIBIT No. 1.

Laws of New York, chap. 114 of acts of 1869.

An act to facilitate the construction of the Cayuga Lake Railroad and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof (passed April 14th, 1869).

365 Section 1 authorizes the county judge to appoint under his hand and seal three freeholders of said town as commissioners to carry into effect the purposes of this act.

SECTION 2. It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the taxpaying inhabitants shall fix upon by their assent in writing, not exceeding in amount ten per cent. of the assessed valuation of the real and personal property of said town as shown by the assessment roll for the year 1868 for said town, at a rate of interest not exceeding seven per cent. for a term not exceeding thirty years, and to execute bonds therefor under their hands and seal.

The bonds so to be executed may be in such sums and payable at such times and places, not exceeding thirty years, and in such form as the said commissioner or commissioners and their successors may deem expedient; provided, however, that the powers and authority con-

366 firm' by this section shall only be executed upon the condition that the consent shall first be obtained in the writing of the majority of the taxpayers of said town owning more than one-half of the taxable property of said town assessed and appearing upon the assessment-roll of the year 1868, which consent shall be proved or acknowledged in the same manner as conveyances of real estate are proved or acknowledged, or proved by a subscribing witness who shall swear in addition to the ordinary form of affidavits of subscribing witnesses that the party assenting inform' the witness that he knew the contents thereof.

The proof required to show that a majority of the taxable inhabitants representing a majority of the taxable property of the town have given their consent required by this section shall be by the affidavit of the assessors or a majority of them of said town, which affidavit, consent, and acknowledgement shall be filed in the town and county clerk's office of the said county, with a copy of the assessment-roll of the

367 year 1868, and it shall be the duty of the said assessors, and they are hereby required, to make such affidavit whenever the said consent shall be obtained on or before the 1st day of January, 1870.

(But the time of obtaining consents was extended by the act of April 1st, 1870, to April 1st, 1871.)

A certified copy of such affidavit, consent, and acknowledgement shall be presumptive evidence of the facts therein contained and shall be admitted in any court of this State and before any judge or justice thereof.

Section 3 authorizes the commissioners in their discretion to dispose of the bonds to anybody at not less than par, and the money raised by the sale of bonds to be invested in the stock of the Cayuga Lake Railroad Company, and the said money shall be used and applied in the construction of said railroad, begin'ing at the north end as aforesaid, and its buildings and appurtenances, and for no other purpose
368 whatever, the public necessity and utility whereof is hereby declared, and in the construction thereof the said town of Springport is immediately interested.

Commissioners may subscribe for the stock of the R. R. Co. for the amount consented to, and may purchase the stock, receive certificates, and the town shall thereby acquire all the rights and privileges of other stockholders, may participate in meetings of stockholders, and eligible as directors.

Section 4. The commissioners to report to the board of supervisors of the county annually the amount required to pay the interest due and to become due. The dividends on the stock to be received and applied. Board of supervisors hereby authorized and required to cause to be assessed, levied, and collected upon the real and personal estate of said town in the same manner as other taxes such sum as reported necessary by the commissioners to be applied to the payment of the principal and the interest of said bonds.

369 Section 5 provides for an agreement to be made with the R. R. Co. to pay the interest on the bonds until the road shall be built and to be afterwards raised by tax and paid to the R. R. Co.

Section 6 authorizes the commissioners to exchange the capital stock they receive for the bonds issued or to sell the stock and apply the proceeds in payment of bonds.

Section 7. At the maturity of the bonds in thirty years, the board of supervisors to levy and collect by tax on the real and personal estate of said town the amount necessary to pay the bonds and interest then unpaid.

Section 8. Commissioners to provide a sinking fund after ten years from issuing of five per cent. per annum to be levied as before to meet the bonds at maturity.

370 Sect. 9, 10, 11, 12, 13, 14, 15, provides for certain details, contingenc'es, &c. not material to this action.

Section 16 requires the avails of the bonds to be paid, laid out and expended in the said town of Springport and for the necessary connection with the N. Y. Central Railroad.

Section 17 makes any person making a false affidavit guilty of perjury, liable, &c.

Section 18. Fare on this railroad for each passenger from Springport to Cayuga not to exceed 25 cents.

Section 19. The interest on these bonds may be payable annually or semi-annually at the discretion of the commissioners.

Section 20. The commissioners may exchange the said bonds at par and issue them directly to the Cayuga Lake Railroad Company, receiving therefor the stock of said company.

371 Section 21. This act shall take effect immediately.

Laws of New York, chap. 152 of acts of 1870, entitled "An act to annul the act of April 14, 1869." (Chap. 314 of acts of 1869.)

Section 1 extends the time in which consents of tax-payers are to be obtained (according to the former act) to the first day of April, 1871.

EXHIBIT No. 2.

STATE OF NEW YORK,
Cayuga County, town of Springport, ss:

In the matter of facilitating the construction of the Cayuga Lake Railroad.

CAYUGA COUNTY, *ss:*

Charles H. Adams, Ethan Allen and Lewis Ludlow, all of the town of Springport, in said county, being each of them severally and duly sworn, do and each of them does for himself severally depose
372 and say: that they, the *the* said defendants, are the duly elected, qualified and acting asessors of the said town of Springport, and that in pursuance of an act of the legislature of the State of New York, entitled "An act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport, Cayuga County, to subscribe to the capital stock thereof," passed April 24th, 1869, and also in pursuance of the act amending the same, passed April 7th, 1870 (extending the time, &c. &c.), these defendants, as such board of assessors, attended at the office of D. A. Robinson, jr., in the village of Union Springs, in said town of Springport, pursuant to notice, on the 22d day of March, A. D. 1871, for the purpose of examining the assessment roll of said town for the year 1868 and comparing the same with the consents in writing of the tax-payers of said town, in accordance with section 2 of the said act of April 24th, 1869.

And these deponents further say that after a careful examina-
373 tion and comparison of the consents in writing, then produced and exhibited, duly acknowledged and proven, as required by said act, it duly appeared that a majority of the tax-payers of the said town of Springport, owning more than one-half of the taxable property of said town, assessed and appearing upon the assessment roll aforesaid of the year 1868, and duly and severally executed their consents in writing, to the effect that the railroad commissioners appointed under section 1 of said act of April 24th, 1869, might borrow on the faith and credit of the said town the sum of one hundred thousand dollars ($100,000), and issue the bonds of the town therefor, in pursuance of the said act, that sum being less than ten per cent. of the assessed valuation of the real and personal property of said town of Springport, as shown by the assessment roll of said town for the year eighteen hundred and sixty-eight.

I. And these deponants further severally depose say that the
374 total amount of real & personal property appearing on the assessment roll of said town for the year 1868 is eleven hundred and five thousand three hundred and seventy dollars ($1,105,370), and that the sum of $552,686 constitutes a majority thereof.

II. That the whole number of tax-payers appearing upon the said assessment roll is five hundred and sixty-two (including those assessed for dog tax and military tax), a majority of which tax-payers must be 282, and (if those assessed for dog tax and military tax be deducted) there are over 237 of such tax-payers owning real and personal property, as appears by said assessment roll, to the amount of over six hundred and twenty thousand dollars ($620,000), who had consented in writing, as aforesaid, to the said loan of $100,000, according to the said

acts of the legislature aforesaid, and whose several consents in writing were duly executed, proved or acknowledged, according to the
375 statutes aforesaid, and if the said tax-payers who are assessed for dog tax and military tax without other property be also counted, then the aggregate of such tax-payers so consenting is over three hundred and twenty (320), there being in either view a clear majority both of tax-payers and of property appearing upon said assessment roll so consenting as aforesaid.

CHARLES H. ADAMS.
LEWIS LUDLOW.

Severally sworn and subscribed before me this 23d day of March, 1871.

DAN'L A. ROBINSON, JR.,
Notary Public in and for Cayuga County, N. Y.

EXHIBIT NO. 4.

At a general term of the supreme court (4th department) of the State of New York, held at the court-house, in the city of Rochester, Monroe County, on the 28th day of September, 1872, present, Hon. Jo-
376 seph Mullin, presiding; Hons. E. Darwin Smith, John L. Tallcolt, associate justices.

Order.

THE PEOPLE, EX REL. PHILIP H. YAWGER,
vs.
ETHAN ALLEN & OTHERS, ASSESSORS OF THE town of Springport, and Lyman Comstock, clerk of Cayuga County.

Determination of assessors affirmed; certiorari quashed; costs to by paid by relator.
A copy.

R. D. JONES,
Sp'l Dep. Clk.

Judgment of affirmance thereupon.

EXHIBIT NO. 5.

Court of appeals of the State of New York, May 6th, 1873.

(Copy order.)

The court did order and adjudge that the judgment of the supreme court and proceedings of the assessors and commisioners appealed
377 from in this action to this court be reversed, annulled, and altogether held for nothing; and it was further ordered and adjudged that the proceedings be, and the same hereby are, dismissed without costs.
Judgment filed June 9th, 1873.

378 (Endorsed:) U. S. circuit court, north. dist. of N. Y. David S. Draper vs. The Town of Springport. Pl'ff's bill of exceptions. James R. Cox, pl'ff's att'y. Filed Feb. 21, 1878.

379 Know all men by these presents that we, David S. Draper, as principal, and M. Ludlow Whitlock and John L. Dodge, as sureties, are held and firmly bound unto The Town of Springport, a municipal corporation in the county of Cayuga, in the State of New York, in the full and just sum of one thousand dollars, to be paid to the said The Town of Springport, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 27th day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately at a circuit court of the United States, held at Utica, in the northern district of New York, in a suit depending in said court between the said David S. Draper, as plaintiff, and the said The Town of Springport, as defendant, judgment was rendered against the said David S. Draper, plaintiff, and in favor of the said defendant,
380 the said Town of Springport, for $658.90 costs, and the said David S. Draper, plaintiff, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, The Town of Springport, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said David S. Draper, plaintiff in error, shall prosecute said writ to effect, and answer all damages and costs if he fails to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID S. DRAPER. [L. S.]
M. LUDLOW WHITLOCK. [L. S.]
JOHN L. DODGE. [L. S.]

Sealed and delivered in presence of—
F. N. DELAND.

381 STATE OF NEW YORK,
City and County of New York, ss:

On this 28th day of February, in the year one thousand eight hundred and seventy-eight, personally came and appeared before me David S. Draper, to me known to be one of the individuals described in and who executed the foregoing instrument, and he acknowledged that he executed the same.

WM. G. HOSEA,
Notary Public, N. Y. Co.

STATE OF NEW YORK,
City and County of New York, ss:

David S. Draper, being duly sworn, says that he is the principal in the above obligation, and the plaintiff in the action therein mentioned; that he resides at the town of Nahant, in the State of Massachusetts, and is worth the sum of two thousand dollars over and above all his debts and liabilities, besides property exempt by law from sale on execution.

DAVID S. DRAPER.

382 Sworn to before me on this 28th day of February, 1878.
WM. G. HOSEA,
Notary Public, N. Y. Co.

STATE OF MASSACHUSETTS,
Berkshire County, ss :

M. Ludlow Whitlock and John L. Dodge, of Great Barrington, of said county, being each of them severally and duly sworn, do, and each of them does, acknowledge the execution of the above instrument, and severally depose and say that he is a freeholder in said county, and is worth the sum of two thousand dollars over and above all debts and liabilities which he owes or has incurred.

N. LUDLOW WHITLOCK.
JOHN L. DODGE.

Subscribed and sworn to before me this 27th day of Feb., 1878.
[L. S.] F. N. DELAND,
Notary Public.

383, 384 (Endorsed :) U. S. circuit c't. David S. Draper vs. The Town of Springport. Bond on writ of error. Jas. R. Cox, of Auburn, N. Y., pl'ff's att'y. Approved. Wm. J. Wallace. Filed March 22, 1878.

385, 386 UNITED STATES OF AMERICA,
Northern District of New York, ss :

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to three hundred and eighty-four inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of David S. Draper against The Town of Springport as the same remain of record and on file in said office, and that the writ of error and citation are herewith returned.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of Utica, in said district, this 6th day of September, in the year of our Lord eighteen hundred and seventy-eight, and of the Independence of the United States the one hundred and third.

[SEAL.] CHARLES MASON, *Clerk.*

387 UNITED STATES OF AMERICA, *ss :*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, greeting :

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between David S. Draper, a citizen of the State of Massachusetts, plaintiff, and The Town of Springport, a municipal corporation of the said northern district of New York, defendant, in which judgment for costs $658.90 was rendered against said plaintiff for costs, a manifest error hath happened to the great damage of the said David S. Draper, plaintiff as aforesaid, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Mon-

day of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 22d day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States,
for the Northern District of New York.

Allowed by—

W. J. WALLACE,
U. S. Dist. Judge.

388 (Indorsed:) U. S. Supreme Court. David S. Draper, pl'ff in error, vs. The Town of Springport, def't in error. Writ of error. James R. Cox, att'y for pl'ff in error. Filed March 22, 1878.

389 The United States of America to the Town of Springport, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein David S. Draper plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable William J. Wallace, judge of the circuit court of the United States for the northern district of New York, this twenty-second day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

WM. J. WALLACE.

390 NORTHERN DISTRICT OF NEW YORK,
Cayuga County, ss:

On this 29th day of March, in the year of our Lord one thousand eight hundred and seventy-eight, personally appeared Dwight F. Taylor, of Ledyard, before me the subscriber, W. J. Winegar, residing at Union Springs, a notary public, and makes oath that on the 29th day of March inst. he delivered a true copy of the within citation to James L. Hammond of the town of Springport, who is personally known to deponent to be the supervisor of said town.

Sworn to and subscribed the 29th day of March, A. D. 1878.

W. J. WINEGAR,
Notary Public, Cay. Co.

(Indorsed:) U. S. Supreme Court. David S. Draper, p'l'ff in error, vs. The Town of Springport, def't in error. James R. Cox, att'y for p'l'ff in error. Citation. Filed April 2, 1878.

391 *Assign't of errors.*

Supreme Court of the United States, of December term, A. D. 1877, that is to say, August 1, 1878.

DAVID S. DRAPER
vs.
THE TOWN OF SPRINGPORT.

Afterwards in this same term before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said David S. Draper, by James R. Cox, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, in holding and adjudging that the said bonds and coupons produced in evidence were void for the inadvertent want of seals to commissioners' names on the bonds; and in holding and adjudging the coupons or interest-warrants aforesaid were affected with the infirmity arising from the want of the seals aforesaid on the bonds;

392 and likewise the court erred in holding and adjudging that the plaintiff had no cause of action by reason of said coupons, and in giving the said judgment aforesaid in favor of said defendants.

Wherefore the said David S. Draper, plaintiff, prays that the judgment aforesaid may be reversed and remanded, and a new trial granted to him by reason of the said error, and that he may be allowed to recover judgment against said defendants for the amount due him in respect to the said demands set forth in his said declaration and proved in this case.

JAS. R. COX,
Of Auburn, N. Y., Att'y for Pl'ff in Error.

(Indorsed:) U. S. Supreme C't. David S. Draper, pl'ff in error, vs. The Town of Springport, def't in error. Assign't of errors. Jas. R. Cox, att'y for pl'ff in er'r.

393 *Joinder in error.*

United States Supreme Court.

DAVID S. DRAPER, PL'FF IN ERROR,
vs.
THE TOWN OF SPRINGPORT, DEF'T IN ERROR.

In error to the circuit court north'n dist. of N. York.

Afterwards, to wit, of the same December term of 1877, that is to say of August 7, 1878, the said The Town of Springport, def't in error, by Etsel Wood, its attorney, freely comes here into court and says that there is no error in the record or proceedings aforesaid, or in giving of the judgment aforesaid, and prays this honorable court now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

ETSEL WOOD,
Of Union Springs, N. Y., Att'y for Def't in Error.

(Indorsed:) U. S. Supreme Court. David S. Draper, pl'ff in error, vs. The Town of Springport, def't in error. No. 1079. Joinder in error. E. Wood, att'y for def't in error. Jas. R. Cox, of Auburn, N. Y., att'y for pl'ff in error.

394 *Stipulation in reference to printing record.*

Supreme Court of the United States.

DAVID S. DRAPER, PL'FF IN ERROR,
vs.
THE TOWN OF SPRINGPORT, DE'FT IN ERROR. } Cause No. 715, Oct's calendar, 1879.

It is hereby stipulated by the attorneys for the respective parties to this action, that in printing this record for the use of the court & counsel, (there being in all 1,226 separate counts or causes of action in the complaint, numbered respectively from No. 1 to No. 1226,) that after printing the first few pages of the complaint down to and including the words (printed in the record now on file) "the said plaintiff for a first cause of action, &c.," and so on down 12 lines to and including
395 the words "the 1st day of March, 1873," then, in place of printing at length the 1,225 other causes of action, insert the following:

Here follows 1,225 other causes of action in all respects similar in form to the foregoing, excepting as to the amounts, dates, and maturity of the coupons on said bonds, from 1873 to 1876, amounting in all, without interest, to the sum of $6,120.50. As no separate question arises upon either of these coupons it is unnecessary to print them. Either party is at liberty to refer to the original record on file for any particulars as to these causes of action or coupons.

396 And this stipulation is to be filed with the clerk of the court for his guidance in printing the said record.

Dated Auburn, N. Y., November 29, 1879.

JAS. R. COX,
Att'y for Pl'ff in Error.
W. F. COGSWELL,
Att'y for Def't in Error.

(Indorsed:) U. S. Supreme Court. 1879, October term. David S. Draper, pl'ff in error, vs. Town of Springport, def't in er. No. 715. Stipulation as to printing record, for D. W. Middleton, esq., clerk. Filed 3 December, 1879. Mr. W. F. Cogswell, of Roch'r, N. Y., substituted in place of Etsel Wood as att'y for def't in error. Jas. R. Cox.

(Indorsement on cover:) No. 159. David S. Draper, plaintiff in error, vs. The Town of Springport. N. New York C. C. U. S. Filed 8th February, 1879.

Supreme Court of the United States. David S. Draper, pl'ff in error, vs. The Town of Springport, def't in error. Writ of error and return.

SUPREME COURT U. S.
FILED
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JAMES H. MCKENNEY, Clerk

UNITED STATES SUPREME COURT.

DAVID S. DRAPER, Plaintiff in Error, *agst.* THE TOWN OF SPRINGPORT, Defendant in Error.	Statement of Facts and Brief for Plff. in Error.

This is Error to the Circuit Court, Northern District of New York.

Action on 1226 Coupons cut from certain Town Bonds issued by Defts. in 1871 in aid of The Cayuga Lake Railroad, under an act of the Legislature, entitled :

> "An Act to facilitate the construction of "the Cayuga Lake Railroad, and to author- "ize the Town of Springport, Cayuga Coun- "ty, to subscribe to the capital stock there- "of," passed April 24, 1869.
>
> (Ch. 314, Laws of 1869.)

This act prescribes the *form* of assent by the taxpayers, to be by written instrument duly acknowl-

edged like a conveyance of land; a majority of all to be investigated and determined by the *Assessors* of the Town; who thereupon make their affidavit of such *majority*, and of the *amount* of Bonds to be raised, file the same, etc.

The County Judge appoints Commissioners, who thereupon are to issue the Bonds under their hands and seals, subscribe for the stock, and with liberty to exchange the Bonds at once to the R. R. Co. for the stock; authorizing the Town, acting by these commissioners, to be stockholders in the R. R. Co.

There was no particular *form* subscribed for the Bonds, but that was left to the *discretion* of the Commissioners

(See Sec. 2 of the Act. Record p 15.)

As matters of fact, the majority executed the proper assent to the Bonds for $100,000, and subscription for that amount of stock; the investigation was made by the assessors, the result ascertained and determined; the affidavits of assessors as prescribed, were duly made and filed Commissioners to execute the Bonds were duly appointed, qualified; they subscribed for the stock of the Railroad Co., executed the Bonds and Coupons and delivered them to the Co. in payment for the stock which they received.

(The substance of the act of the Legislature as far as it affects the question, is found at Record p. 15.)

U. S. CIRCUIT COURT.

Northern District of New York.

AVERY,
vs.
SPRINGPORT.
Opinion of Hon. A. S. Johnson.

JOHNSON, Circuit Judge.

The material question in these cases is whether the execution of the instruments called bonds was sufficient in form to bind the defendant. The statute under which they purport to have been issued was a law of New York, entitled "An act to facilitate the construction of the Cayuga Lake Railroad, and to authorize the town of Springport to subscribe to the capital stock thereof," passed April 24, 1869, (N. Y. Laws of 1869, vol. 1, p. 677.) The second section of the act is the only one which authorizes any one to bind the town for the payment of money in aid of the railroad to be constructed. It enacts that "It shall be lawful for the said Commissioner or Commissioners (for whose appointment provision was made by the first section,) *to borrow on the faith and credit of the said town*," a certain sum of money, at a rate of interest not exceeding seven per cent., for a term not exceeding thirty years, and to execute bonds therefor, under their hands and seals. The instruments sought to be treated as bonds under

the statute are not under seal, although their wording shows that sealing was contemplated (as a *necessary* part of their execution).

These actions are brought upon a certain number of coupons detached from bonds so executed without seals. The coupons are not themselves sealed, nor are any of them executed by the signature of more than one Commissioner. They are, therefore, subject to all the difficulties which the bonds are liable to. The defect, if it be one, being in the execution, which does not pursue the *direction* of the statute, neither the plaintiffs nor any one else can have become possessed of the bonds without knowledge of the absence of seals, and of the requirements of the statute in that regard. These actions are on the instruments and the recovery can be only had on them.

The law which authorizes bonds to be issued prescribes the form and mode in which they are to be executed. They are to be under the hands and seals of the Commissioners. Instruments under their seals and not under their hands, or under their hands and not under their seals, are alike not executed in conformity with the statute, and are alike inoperative to create an obligation against the town. The principle is involved in the People vs. Mead, 24 N. Y. R., 124, where instruments, called in the statute *bonds*, were held properly executed without being sealed, the act directing their execution to be under the official signatures of certain designated officers, and that mode of execution having been employed.

Various cases have been cited, showing that a party required to give an instrument under seal cannot, in an action against him, insist on his own omission to seal the instrument as a defense. Such was the case of an unsealed bond on attachment — Kelly v. Mc Cormick, 28 N. Y., 321, and United States v. Linn, 15 Peters, 315, the case of a surety for a receiver of taxes whose bond was unsealed. The Court held in that case that the instrument was a good obligation at common law unsealed.

Other cases resting on the same grounds are cited, but none of them give any countenance to the idea that a mere statu-

tory power can be so executed as to impose an obligation, unless the statutory authority is pursued. In the Town of Coloma vs. Evans, 92 U. S. R., 489-90, stress is laid upon the fact that the execution of the instruments was in exact conformity with the provisions of the statute, and it is held that by such an execution, the statutory pre-requisites to the issuing of the bonds are established in favor of a *bona fide* holder for value. In the same case, the doctrine of the Courts of the United States is stated, perhaps in its broadest form, in support of the rights of *bona fide* holders of municipal bonds, so far as compliance with precedent conditions prescribed by statute is concerned, where the requisite legislative authority has been given to a municipal corporation or its officers to issue municipal bonds. But in none of the cases have I found even an intimation that anything will serve to supply the want of an execution such as the statute calls for. Indeed, it seems plainly to result from the fact that the *power* originates only from the statutory grant, that the statute must be followed in order to make out an execution of the statutory power.

The verdict must be set aside for the erroneous ruling at the Circuit in respect to the want of the seal, and a new trial must be ordered, with costs to abide the event.

Ordered accordingly.

UNITED STATES OF AMERICA,
CIRCUIT COURT CLERK'S OFFICE, NORTHERN DISTRICT OF NEW YORK. } ss.

I, Charles Mason, Clerk of said Court, do hereby certify that I have compared the foregoing copy of opinion with the original now on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of
[L. S.] the said Court to be affixed, at the City of Utica, in said District, this 9th day of July, A. D. 1877.

CHARLES MASON,
Clerk.

The Bonds were sold by the R. R. Co. in Wall Street, New York, for the money, in August and September 1871; the Railroad was built and finished, and in operation since 1872.

In executing the Bonds, the Commissioners *inadvertently omitted to fix on the usual little paper seals* after their names.

(For form of Bonds see Record pp. 12, 14.)

The Town made no provision for the payment of coupons as the object of their issue had been accomplished.

This action was brought January 29, 1877.

The defendants set up a variety of defenses, alleging insufficiency of assents, review of assessors' computation in Supreme Court and the Court of Appeals by Writ of Certiorari, at the relation of one Yawger, by which the judgment and determination of the Supreme Court, (which *affirmed* the action of the assessors.) was reversed three years after the Bonds had been sold.

The answer claims also that the Bonds were *void for the lack of seals.*

On this *last point*—the lack of seals by the Commissioners, the learned District Judge decided the case against the Plaintiff; being constrained by the opinion of the late Circuit Judge, (Hon. A. S. JOHNSON, deceased) which was delivered in the case of *Avery vs Springport.*

(Copy opinion herewith presented.)

Judge Johnson having in that case held the Bonds void by reason of the *lack of seals* the present case was decided upon that authority against the Plaintiff, who sued out this Writ of Error.

The Plaintiff in this case, deriving his title from those who purchased in good faith, paying their money at par for these Bonds in New York City in 1871, has probably no occasion to notice the various other defenses set up in the answer; such as the insufficiency of assents, the Certiorari proceedings (between other parties) &c., and invites the attention of the Court directly to the question: *whether the incidental and inadvertent omission to affix the seals to the names of the Commissioners on these Bonds*, so affects their validity as to render the coupons *void* in the hands of *bona fide* holders.

The PURPOSE of the Act set forth in its title was to enable the Town to *borrow* the money, and thereby facilitate the construction of the Railroad.

In providing for this purpose the Act prescribes two classes of details:—

FIRST—The *assent* of the tax-payers,—the *majorities* of person and property—the *form* of acknowledgement, the time and *amount* of loan to be defined, and the requisite proofs of these facts, by the *affidavit* of the assessors.

These requisites are for *the protection of the borrower*:—are important; of the essence of the authority, conditions precedent to its exercise.

SECOND—The preparing of the *evidences* of the loan, called *bonds*, *their execution in no particular form*, but to be *signed* and *sealed* by the commissioners, and sold, or exchanged for the stock of the company. These provisions are for the *lenders' benefit.*

It is now objected, that one of these latter prescriptions to be executed by the *borrower*, for the protection of the *lender*, has been neglected by the *borrower;* and the invalidity of the instruments is sought to be predicated of that neglect.

All else, has been rightly done. *The money was borrowed* and applied; these evidences which we call *bonds*, were executed, delivered and accepted, in an imperfect condition.

The Commissioners neglected to affix the seals. The Statute is

> Sec. 2. "It shall be lawful to borrow, * * * and to execute Bonds therefor, under their hands and seals." Record, p. 15.

Was the affixing of these paper seals by the Commissioners so *required* by the statute, as that their absence invalidates the evidences of the loan?

The statute makes it *lawful* for the Commissioners to execute them under their "*hands and seals*;" and the bonds themselves recite the seals.

Hatch vs. Benton, 6 Barb. 37.
Thompson vs. Sergeant, 15 Abb. 452.
Stewart vs. Slater, 6 Duer 84.
Smith's Comm. on Statutes,
Ch. 15, Sect. 670, 678.
Sedgwick on Stat., 316—
Which doctrine is approved and enforced in this court.
Supervisors vs. Galbraith, 99 U. S. 215,
Ib. 499, 681.

ILLUSTRATIONS OF THE RULE.

Shaw vs. Tobias, [3 Comst. 191.]

Action on replevin bond. The statute required *two* sureties, whereas there was but one on this bond; the defendant claimed the bond not to be according to statute, and therefore void.

The Court held [p. 192] that the proceedings might have been set aside, or they might have excepted to the insufficiency, &c.

"But it is nowhere decided that the bond is void for not having two sureties. If substantially good without the sureties, he may waive a strict compliance, &c., &c."

Again [p. 193] "The obligor does not complain that the other party has violated the statute, *but that it was not complied with on his own part.*"

"And this, after he has had the benefit of the

bond, &c., &c." "Such an objection can be of no force—* * the bond is valid and binding."

In Kelly vs. McCormick [28 N. Y. 321] sheriff sued on a bond which had been given him on attachment proceedings.

The "*bond*" *had no seals*, and defendant moved dismissal of the complaint, *because it was not a bond, and was not in accordance with the statute*," [p. 319].

By the Court [p. 321] "This bond is in all respects in accordance with the provisions of the statute, with the *exception of the lack of seals*, which may have been entirely overlooked by the sheriff."

"In many cases where bonds have been taken, not in accordance with the statute, but where it was plain that neither oppression on the one hand, nor ease or favor on the other was designed, the bonds have been held good."

"A substantial compliance with the statute is all that is required."—(Citing cases.)

Again [p. 323] "After obtaining the advantage of it, &c., &c., they ought not to be permitted to get rid of it, by alleging that it was not so strong or so perfect as they might have been required to make it. It is enough that it contains all the essentials

of a valid contract, and answers all the purposes intended by the statute."

Again in Fiedler vs. Mead [24 N. Y. 123] which was the case of the town bonds of Genoa issued for railroad purposes, under a similar statute; it was objected that *there were no seals on the bonds*, and that the statute could only be satisfied by instruments under seal.

But the court held it unimportant, the bonds being in proper form otherwise. And these bonds were enforced by the final decision of the U. S. Supreme Court, March, 1876.

(Rept'd with other cases 2 *Otto.*)

In *San Antonio* vs. *Mehaffey* [96 U. S. 315] where the statute directed *bonds* to be made, with liberty to use any other way of extending the municipal credit; this court held that the neglect to affix the seals was unimportant.

In People vs. Atkinson [64 N. Y. 47] the supervisor refused to issue the bonds because one provision of the statute about a certificate had not been complied with. *Mandamus* applied for, which the Special and General Terms refused. On appeal to the Court of Appeals held:—

"The point taken is without foundation. The certificate was sufficient to show what was intended, and substantially in accordance with the statute. But if it was not, as the statute *was directory in this respect, and the certificate could be added after*

the bonds were executed as well as before, it was not material."

(Order reversed and mandamus issued.)

In *Moore* vs. *Mayor* [73 N. Y. 250] certain publication of ordinance was held to be *mandatory* as to the *city*, but merely *directory* as to the contractors performing the work. The Court holds:—

> "Standing between the citizen whose pro-"
> "perty was threatened, and the city, the"
> "Court could well hold that the law was"
> "*mandatory* in favor of the citizen, and that"
> "in order to a local assessment it must be"
> "strictly observed: but as between him who"
> "has *bona fide performed the work*, and the"
> "city which has accepted and brought it"
> "into use, but refuses to pay for it,—it may"
> "consistently say, that [such condition pre-"
> "cedent] is no shield and protection to the"
> "city; but *quoad these parties*, and the liti-"
> "gation in hand, it is MERELY DIRECTORY;"
> "and the want of a literal observance of it"
> "not fatal to the contracts made in pursu-"
> "ance of it."

We submit that these cases sufficiently show the current of the authority; and that the lack of seals does not affect the validity of these instruments.

But if these seals are to be regarded as necessary to the validity of these instruments, there is another well settled principle of law, under which the holders are authorized to remedy this defect, viz:

POINT II.

The town of Springport having voluntarily and for value, issued these obligations, *reciting the seals of the Commissioners*, and sent them into circulation as sufficient and valid obligations, (inadvertently omitting the seals) have *thereby* authorized the *bona fide* holder, at any time to supply the defect.

1st Daniels' Neg. Inst. Sec. 142, and many cases cited.
Chitty on Bills, 184, 185.
Brutt vs. Pickard, Ryan & Mood, 37.
Doe vs. Houghton, 1 Mann. & Ryl. 208.
Boyd vs. Brotherson, 10 Wend. 93.
Hervey vs. Hervey, 15 Maine 357.
Hunt vs. Adams, 6 Mass. 519.
Clute vs. Small, 17 Wend. 241.
Mitchell vs. Culver, 7 Cowen 337.
Parsons vs. Jackson, 99 U. S. 435.

"Where a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up," &c., &c., "such negotiable instrument carries on its face an implied authority to fill up the blanks, *and perfect* the instrument. In other words, it is the act of the principal and he is bound by it."

Garrard vs. Holden, 67 Penn. 82.
Fleckner vs. U. S. Bank, 8 Wheat. 338.
Redlich vs. Doll, 54 N. Y. 237.
Wangh vs. Bissell, 1 Marsh. 214, 311, 66 Barb. 533 & cases.
Wagner vs. Millington, 8 Hun. (N. Y.) 142.
Bk. of Pittsburg vs. Neal, 22 Howard 107.
Davison vs. Lanier, 4 Wall. 457.

(Of course no authority can be needed to show these bonds to be, and intended to be *negotiable paper*.)

In a recent case [*Angle* vs. *N. W. Ins. Co.*, 2 *Otto* 339) the Supreme Court of the United States have stated the rule thus:

"Beyond all doubt, such a party may fill every blank which it is necessary should be filled to perfect the instrument and render it operative, *within its scope and design, if the terms of the instrument sufficiently indicate what the scope and design are*"

See also

Vanduzer vs. Howe, 21 N. Y. 537–8.

(We submit, that the affixing of these little *paper seals* to this bond, which can be done by any child without erring, furnishes a complete illustration of this rule.)

In Orrick vs. Colston [7 Gratt. 189] the rule is well stated by DANIEL J. at page 195, reviewing the authorities.

In ————————8 Leigh [Va. 43] the character of such an alteration as invalidates the instrument, is shown: e.g. changing the *time* from 60 days to 30 days.

In Montague vs. Perkins [22 Eng. L. & Eq. 516] the rule is stated thus:—"The holder is authorized to fill up and supply the blanks, acting within the provisions of the instrument."

Citing many cases.

The same doctrine in Violet vs. Patten [5 Cranch. 142]—"where the extent of the contemplated obligation is not enlarged."

In Fullerton vs. Sturgis [4 Ohio 534] where a blank negotiable note was filled in for $10,000, and seals added and affixed after the signatures without the knowledge of the makers,—the whole subject is considered, and the validity of the instrument confirmed and enforced.

In Ives vs. Farmers' Bank [2 Allen, Mass. 236] there was a negotiable note issued in blank, with the *time*, the number of makers, (whether "we" or "I") the payee, the amount, and place of payment, all left blank: the Court held [p. 240] that the Bank would have been authorized to fill the payee blank with any *name* they chose, but not to fill up the *time*, "three months."

In White vs. Vermont R. R. [21 Howard 275] Rail Road Bonds were issued, payable to——— ——— or——— ———.

The *bona fide* holder filled up the blanks with his own name or "order."

The U. S. Supreme Court sustained his authority to do so, reviewing the course and tendency of jurisprudence on this subject in England, and in this country. [p. 578.]

Cutchly vs. Mann [5 Taunt. 529] "any bearer who came regularly by the note, might fill the blank with his own name as payee."

In U. S. vs. Nelson [2 Brock. 64] MARSHALL C. J. recognizes the rule to be, that the *bona fide* holder

is authorized to fill blanks *and supply the defects agreed upon* by the parties.

He thought it probable the time would come, when the courts might completely abolish in this particular (*of seals*), the distinction between sealed and unsealed instruments.

See also

Mich. Bank vs. Eldred, 9 Wall 552.
Bank vs. Kimball, 10 Cush. 373.
Collins vs. Emmett, 1 H. Blackst. 313.
Cope vs. Daniel, 9 Dana 415.

But it is quite true, that if these bonds had been originally *stolen*, in an incomplete condition from maker's possession, having never been issued voluntarily, *the authority* to perfect them, would not have been conferred even upon a subsequent *bona fide* holder.

Ledwick vs. McKimm, 53 N. Y. 307,
compared with
Welch vs. Sage, 47 N. Y. 147.

Under these authorities, what can be plainer, than that the *bona fide* holder has the right conferred by the issuing of these instruments for value, in this condition, *to-day* to affix the contemplated seals?

The supplying of a defective execution of negotiable instruments *in this manner*, we submit to be less objectionable on every ground, than any possible amendment *with the pen* filling up blanks, &c.

Just what was done in
Phelps v. Yates
16 Blatchf. C

POINT III.

These seals are not essential to the validity of the instruments: they are good without them, substantially complying with the letter, spirit and purpose of the statute.

Wadsworth vs. Wendell, 5 John Ch. 228.
U. S. Fund vs. Chase, 6 Barb. 42.
Smith's Comm. Chap. 15, 771, Secs. 670, 678.

The case of U. S. vs. Linn [15 Peters 290, 316, 317] was that of an official bond given by a public officer. It was without seal. The act of Congress required a sealed instrument. It was claimed therefore to be a nullity.

But the court hold [p. 315] "The only objection urged against this instrument is, that it has no seals annexed. In every other respect it conforms to the requirements of the statute

And what is the difference? Only that in the one case the seal imports a consideration, and in the other it must be proved."

"There ought to be some very strong grounds to authorize a court to declare an instrument absolutely void, which has been voluntarily made upon a good consideration, and delivered to the party for whose benefit it was intended"

"A mortgage or any other approved security voluntarily given, would, no doubt, be valid."

[P. 317]—"The only departure of the instrument from *the directions* of the statute, is the want of a seal; and this may have been omitted by unintentional mistake, or accident, and wholly without

design. We think the mere want of seals not such a departure of the Act, as to warrant the court to pronounce this instrument void; it being good at common law, *and given in furtherance of the great object of the statute.*"

Now if we have [*ante*] correctly apprehended THE GREAT OBJECT OF THE STATUTE, under which these bonds were issued, to be *the borrowing of money to help the railroad* [as its title proclaims it,] this doctrine would apply with even greater force. There, it was to enforce a *penal* obligation; here to enforce a contract where the party has received the *benefit.*

The remarks of the Court in Curtis vs. Leavitt [15 N. Y. 162, 163] seem to be apposite; since in this case at bar, the parties lending the money and taking these unsealed instruments were perfectly at liberty to *waive the sealing*, especially as it is abundantly held that any party may waive a statute or even a constitutional provision intended for his benefit.

Buel vs. Lockport, 3 Comst. 197.
Root vs. Wagner, 30 N. Y. 9.
Phyle vs. Eimer, 45 N. Y. 102.

And this statute authorizing these bonds, gives any latitude of discretion in regard to the *form* of the obligation.

Sec. 2 of Act.

The Court says [15 N. Y. 193] "I regard it as of no moment by what name they are called. If they are not obligatory upon the corporation as *bonds*, they are as *special contracts* for the payment of the money obtained under them; and if the judicial conscience cannot be satisfied with anything less than the common law seal to make them effectual for the purposes intended by all the parties to them, then the court should relieve against the defective execution, *and reform them* upon the pleadings and proofs in these actions. The banking company intended to give, and the holders intended to receive *bonds*, under seal, executed in due form. The former omitted to affix the seals, and the latter supposed them duly affixed, and thus made a mistake, &c., &c.

In 2 Daniels' Negot. Inst., p. 430 [Sec. 1495] the cases are collated, and the doctrine deduced:—

"In common parlance the term *bond*, is generally understood to signify a *sealed* instrument, in contradistinction to bills and notes, &c., &c. And as a general rule a bond is a sealed Instrument. But it does not follow that it always is, or must be.
p. 431—And it is now pretty well settled by authority, as indeed it is clear in reason, that it is not necessary to constitute a corporate obligation a *bond*, that it should bear its seal."

"And the term *bond*, as now applied to state and corporate obligations, is simply intended to signify its permanent investment securities, in contradistinction to those of an ordinary and current nature, such as bills and promissory notes."

"In New York, where the legislature authorized the town of Genoa to issue "*bonds*;" and instruments were issued with coupons attached, and for-

mal in all respects, except that they bore no seals, it was held that they were valid bonds notwithstanding." Citing

People vs. Mead, 24 N. Y. 124.
Conn. Ins. Co. vs. Cleveland, 41 Barb. 22.
Augusta vs. Bank, 56 Maine 176.
Virginia R. R. Co. vs. Clay, unreported.

The opinion and reasoning of Judge JOHNSON seems to lose sight of the *object and purpose* of the statute; which was— not *to make bonds;* but to *enable* the Town *to borrow*, and *to facilitate* the construction of the Railroad. Those objects and purposes have been fully attained.

Again: he recognizes that this defect consists in not obeying the *directory* portions of the statute:— viz:—

> "The defect being in the execution, which "does not pursue the *directions* of the stat- "ute."

Thus sacrificing the object and purpose of the statute, to the incidental and *directory* means to be employed in furthering that purpose.

The only notice which the Court of Appeals of New York, took upon this subject of *seals* on these bonds, is found in 75 N. Y. 408—in the following words:—

> "I have not discussed the point in regard "to the defect in the execution of the bonds, "which consists in the omission of the Com- "missioners to affix a seal to the signatures, "as directed in the Act.
>
> "The omission cannot have produced any "injury to the rights of the Town, and the "direction to affix seals was not intended for "its benefit, but for the benefit of the lender "of the money.
>
> "I do not regard the point made in respect "to it as one which addresses itself with "much force to a court of equity as a ground "for exercising its discretionary power to "decree the cancellation of a security upon "which an innocent party has advanced mo- "ney." Opinion by RAPALLO J.

Finally:—We are here with these instruments, executed and delivered by the town, *intended to be in all respects* according to the statute, and yet with this technical defect of lack of seals from inadvertent omission. Yet we lent our money upon them: the town has the benefit, all the benefit contemplated by the statute and by the makers.

The defect is in a matter which was intended for *our protection*, and which it was and is the duty of the town to supply: it is their own neglect they plead.

Even without this being supplied these instruments have answered and do answer every purpose contemplated by the Act and by the makers.

We therefore ask for a reversal of this Judgment; and for an Order directing Judgment to be entered for the Plaintiff, for the said sum of $6,128 50 with interest; as in the case of

Cromwell vs. Sac. Co., 94 U. S. 351.

Auburn, N. Y., Sept., 1881.

JAS. R. COX,
Atty. for Plff. in Error.

Supreme Court of the United States.

No. 159.

DAVID S. DRAPER,

Plaintiff in Error.

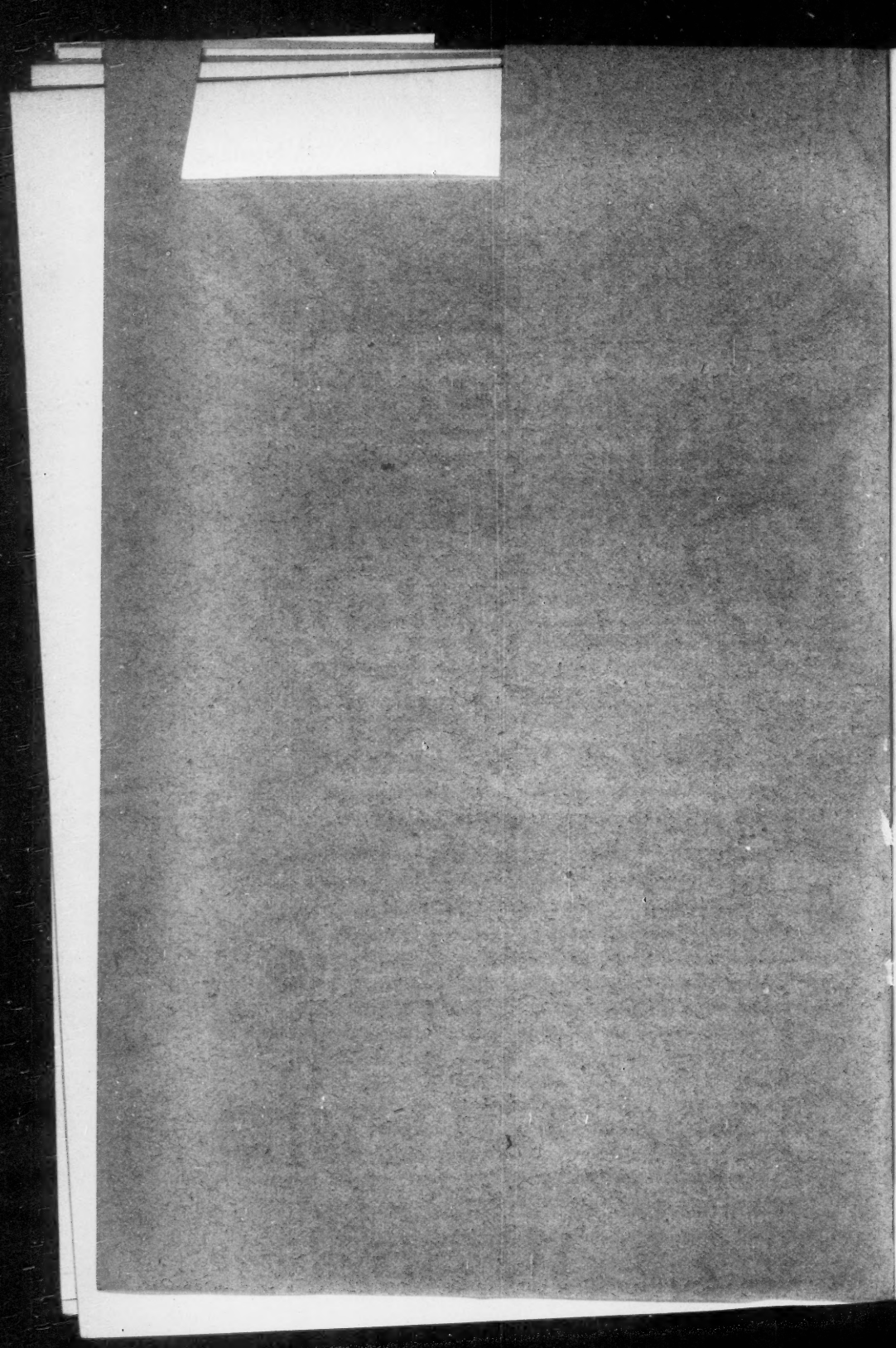
VS.

THE TOWN OF SPRINGPORT,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM F. COGSWELL, Of Counsel for Defendant in Error.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

DAVID S. DRAPER,

Plaintiff in Error,

against

THE TOWN OF SPRINGPORT,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The Defendant in Error is a town in the county of Cayuga, in the State of New York. On the 24th of April, 1869, the Legislature of the State of New York passed an Act (Chap. 314 of the Laws of that year) authorizing the appointment of commissioners of that town, and empowering them to borrow upon bonds of the town, *to be executed under their hands and seals*, a sum of money to be determined by the tax-paying inhabitants in the manner prescribed, and invest the same in the stock of the Cayuga Lake Rail Road Company. By Section 20 of the Act, the commissioners were authorized to issue the bonds to the Rail Road Company in exchange for the stock of the Company. In August, 1871, the commissioners subscribed for $100,000 of the stock of the Rail Road Company and delivered to the officers thereof in exchange therefor, certain instruments, a sam-

ple of which will be found on page 6 of the Record, and which were imperfect and incomplete, in that there were no seals attached to the commissioners' names. No seals were ever attached thereto. The defendant on the trial, endeavored to show certain matters in defence, as that there were never secured the requisite assents, and that the subscription and exchange before stated were made after a writ of *certiorari* had been issued, upon which the proceedings to bond the town were finally reversed by the Court of Appeals of the State of New York, but all this evidence was rejected, and as I suppose, no question thereon can be raised in this court.

The court however held that the bonds were void as not in accordance with the statute, and that the coupons upon which this action was brought and which were cut therefrom were also void, and directed a judgment for the defendant. In this the court followed the decision in Avery vs. the same Defendant, reported in 14 Blatchford, 272.

FIRST.

The town had no power to subscribe for the stock of the Rail Road Company, except by vitrue of the statute in question. It is not one of the powers appertaining to it as a municipal corporation.

> "It is settled (says this court, speaking by the Chief Justice) that unless the power to issue bonds for the payment of municipal subscriptions to the stock of rail road companies is given in express terms or by reasonable implication, no obligation of that kind can be created."
>
> Wells vs. Supervisors, 102 U. S., 625, 630.

That the law is very stringently so held in New York, see

People vs. Smith, 45 N. Y., 773.
People vs. Hulburt, 46 N. Y., 110.
People vs. Spencer, 55 N. Y., 1.
Springport vs. The Savings Banks, 75 N. Y., 397.

SECOND.

As it could subscribe only by virtue of the authority of the statute, its requirements must be strictly complied with.

Cases cited under last point.

THIRD.

The statute both expressly and impliedly requires the obligations to be issued by the town to be under seal. Impliedly because it speaks of them as bonds, which term implies a sealed instrument (Board of Education vs. Fonda, 77 N. Y., 350), and explicitly by requiring them to be under the hands and seals of the commissioners.

FOURTH.

The so-called bonds which lie at the foundation of the action have never been executed.

They bear evidence on their face that they are incomplete and imperfect. They recite that they are under the hands and seals of the commissioners, and they are not. There can therefore be no *bona fide* holder in the case, as upon their face they give notice to every one of their incomplete condition. Suppose, for the sake of the illustration, they had been sealed but not signed. Would any one claim that they were valid? Certainly not. Is the omission of one requisite of any less effect than the omission of another?

The statute requires two things to a valid execution. One is omitted. The instrument is not executed.

FIFTH.

The omission of the seal is a substantial one which the court will not disregard. It changes the entire nature of the instrument.

It is no answer to this argument to say that the affixing the seal is a form. Why is a seal upon one of these instruments of less importance than a seal upon a warrant for arrest for crime? There has been some conflict of opinion whether a warrant of arrest must be under seal at the common law, or whether it was necessary only when required by statute. See

Millett vs. Baker, 42 Barbour (N. Y.) Sup. Court Reps., 215.
The People vs. Holcombe, 3 Parker's Crim. Rep., 656.
Welch vs. Scott, 5 Iredell's Law Reports, 72.
State vs. Drake, 36 Maine, 366.

But it has always been agreed that if it lacked the seal when necessary, either by the common law or statute, the instrument was void and no protection to party, magistrate or executive officer.

See cases above cited, and also

Beekman vs. Traver, 20 Wendell, 67.
Bellinger vs. Gray, 51 N. Y., 610.

Why the seal is required is well stated by Judge Shipley in the case from Maine. It arrests attention, gives opportunity for reflection, and is recognized in law and in fact as an act of greater solemnity than the mere writing of one's name.

But it is enough as it seems to me that the statute requires it. The statute is its own sufficient reason.

SIXTH.

The authorities upon which the plaintiff relies are not in conflict with the foregoing propositions.

The most apposite are those cases which have arisen upon official bonds, as

United States vs. Linn, 15 Peters, 315.
Kelly vs. McCormick, 28 N. Y., 321.

and the case of

Board of Education vs. Fonda, 77 N. Y., 350.

But a moment's reflection will show that these cases do not aid the plaintiff. Bonds were required for certain purposes, as the principals taking office, or the issuing of an attachment. The defendants, *natural persons*, gave instruments not under seal. It was held in these cases that the instrument was a good common law agreement, and that the principals taking office and receiving the public money or the issuing and levy of the process was a sufficient consideration to support it.

The defendant, an artificial person, had no power to execute a common law agreement, only a statutory one, and the question is, has it complied with the statute?

There is another class of cases relied upon, drawn from the rule of the commercial law, that when notes or bills are executed and delivered to another in blank, there is an implied authority to fill the blank. The attempt to apply that class of cases begs the whole question. The question here is, were these papers ever *executed?* If they were, that is an end of the question. If not, the same; when the counsel has found a case that holds that when one hands another a note complete except the signature such other is authorized to sign the same with the name of the party handing it to him, he will have found a case like the present.

The question comes back to this, no matter where we start, were the bonds ever executed?

SEVENTH.

The plaintiff cannot claim anything from the doctrine of bona fide ownership. The defect was patent on the face of the instrument.

EIGHTH.

It should be borne in mind that the money was not borrowed by the town and these instruments issued therefor. They were exchanged for stock of the company under the 20th section of the Act in question.

The judgment should be affirmed with costs.

WILLIAM F. COGSWELL,

Of Counsel for Defendant in Error.

OFFICE SUPREME COURT U. S.
FILED
NOV 22 1881
JAMES H. McKENNEY, Clerk.

SUPREME COURT.

SUPREME COURT OF THE UNITED STATES.

JOHN J. STEWART,
Pl'ff in Error,
vs.
THE TOWN OF LANSING,
Def't in Error.

No. 184.
(Actions 2d and 3d.)

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

Two actions (consolidated) are here (Record, p. 45), Nos. 2 and 3.

A former action, No. 1, upon *one coupon from each bond* issued, had been tried upon all the issues and passed into judgment, which was paid.

Record, pp. 39, 55 to 64.

That judgment represented *the whole interest* payable upon all the bonds, on the 1st July, 1873.

Record, p. 63, bottom.

That former adjudication *involved all the issues* afterwards raised by actions Nos. 2 and 3 (consolidated), now before the Court.

The whole litigation in the action No. 1 was upon the *bonds*,

assailing their regularity and validity, and not upon the *coupons*, as will appear from the pleadings and decision.

Record, pp. 56 to 63 and 86, 87.

These consolidated actions, Nos. 2 and 3, were tried before Judge Wheeler, of Vermont, and a jury, at Canandaigua, N. Y., (during the absence of the District Judge Wallace, in Europe,) in June, 1877.

Plaintiff produced the 75 bonds—the whole issue—proved their genuineness, tendered all the past due coupons, except those previously recovered on, in all 8 sets, half yearly interest, pursuant to stipulation.

Record, pp. 43, 55, 64.

Proved the judgment of the County Judge (under the general law of 1869).

Record, p. 49.

Proved the appointment of the Commissioners and their qualification (Record, p. 51); their subscription to the stock of the R. R. Co.; their issuing of these bonds in payment, with all these coupons attached.

Record, p. 54.

Plaintiff then introduced the record of the former suit, claiming it as an adjudication on all the issues raised in this case.

Record, pp. 54 to 64.

By which it appears:

1. That all the bonds, their regularity, validity, were there in issue and tried.

Vide Declaration, pp. 56 to 59.

2. That the defenses then interposed were:

Record, p. 59, &c.

(1.) Non assumpsit, and the

(2.) General issue.

(3.) Signatures obtained by fraud.

(4.) R. R. Co. not a valid organization, or legal existence, and no proof of a majority of tax-payers, and County Judge no jurisdiction.

(5.) One Beardsley got out a *certiorari* to review, and Supreme Court reversed the County Judge's judgment, in May, 1872.

(6.) Said R. R. Co. and plaintiff had due notice, and said bonds and coupons are the same set forth in declaration.

(7.) Plaintiff took the transfer of said bonds and coupons after said reversal, and with full notice.

3. That these issues were tried before Judge Wallace, in 1876, and judgment rendered for the plaintiff, on all the coupons (*one from each bond*, numbered from 1 to 75,) due July 1, 1873.

Record, pp. 63, 64.

Plaintiff likewise introduced a computation of all the interest due upon these 8 sets of coupons.

Record, p. 64.

And tendered all these coupons, asking for verdict.

Page 84.

A question arising as *to what was* adjudicated in the former record, the Court confined the plaintiff to what appears in the printed case, as reported in 13 Blatchford, 428, &c.

Page 79; also pp. 85 to 87, Record.

And the decision and opinion in the Stewart case was read in evidence by plaintiff.

By which it appears:

Record, p. 86.

1. Action between same parties.

2. On coupons from these bonds falling due July 1, 1873.

3. Same (substantial) defenses interposed.

4. Also defense about the *seals*.

5. And judgment duly rendered July 11, 1876.

Record, p. 64.

Noticing the tendency of the views of the learned Judge, the plaintiff further introduced the whole history of these bonds by the testimony of witnesses.

By which it appeared:

Record, pp. 66 to 70 and 80 to 83.

HISTORY.

1. The issuing of these bonds, in October, 1871, in payment for so much stock of the railroad.

2. That a *loan* was made on them to the R. R. Co., by bankers in Wall street, on 12th of October, $50,000, and held for 6 months, offering the bonds for sale.

Same loan then *transferred* to other bankers in Pine street, who held the bonds 4 to 6 months, offering the bonds for sale; then loan re-transferred to first bankers, L. S. & Co.

3. Then, November 26, 1872, *same loan* transferred to Elliot, Collins & Co., bankers, of Philadelphia, who held them until February 8, '73, when they sold them for cash, which paid the loan, and the balance was drawn by the R. R. Co.

4. Further particulars appear by the deposition of Wm. Elliott.

Record, pp. 68 to 70.

Showing the documents relating to this loan and transfers.

And this was the plaintiff's case.

DEFENSE.

The Court then allowed defendants (against plaintiff's objections and exceptions,) to introduce evidence:

1. As to the Bailey action, *not pleaded.*

Record, p. 65.

2. As to the com. law *certiorari*, and proceedings under it.

Record, p. 71.

3. As to the organization of the R. R. Co., with a view to deny its legal organization.

4. Testimony on the subject of *seals* on the bonds (which had also been tried before).

Record, pp. 75, 76.

5. Various *colloquia* between and among various outsiders.

Pages 76 to 80.

All this against repeated objection and exception.

Plaintiff had mainly relied upon the former adjudication, and was not prepared, at this trial, again to controvert these defenses.

Plaintiff requested the Court to strike out this objectiona-

ble evidence, and to direct the verdict for the plaintiff, for the amount of the interest due.

Defendant requested the Court to direct a verdict for defendant, which the Court proceeded to do, giving his views and conclusions at length.

Record, pp. 88 to 94.

In June, 1878, on a motion by plaintiff, for a new trial, the Judge reviewed the evidence and *denied* the motion, holding as appears:

Record, pp. 94 to 99.

1. That the proceedings to bond the town were under the law of 1869.

2. That, by the law of 1871, they could be reviewed by *certiorari*.

Page 97.

3. That the mere *service* of the *writ* annihilated the completed judgment, so that there was no foundation for issuing the bonds.

Record, p. 98.

4. That the purchaser would be bound to go to Ithaca, N. Y., (the county seat) and examine the record of County Judge.

5. That upon examination, the purchaser would necessarily find that a *certiorari* had been issued, &c.

6. That these bankers, Leonard, Sheldon & Co., of New York, and Elliott, Collins & Co., of Philadelphia, "*were not unaffected with notice* of the defects "in these bonds."

Record, p. 98, citing M'Clure v. Oxford, 94 U. S., 429.

7. The Judge concluded (p. 99) by remarking that,

"These conclusions *are different somewhat* from "those reached in the former case," (by Judge Wallace) and denied the motion for a new trial.

Plaintiff sues out this writ of error.

The particular errors assigned are as follows:

1. The admission of improper and irrelevant evidence.

(1.) As to the Bailey action, there being nothing in the *pleadings* to justify it.

Record, p. 65.

(2.) As to the *certiorari* proceedings, filed May 27, 1872.

Record, pp. 71, 74.

(3.) In allowing evidence on the subject of *seals* and registration.

Record, p. 75.

(4.) As to who got up the *form* of the bonds.

Record, p. 77.

(5.) In respect to bond of indemnity to R. R Commissioners and *conversation*.

Record, pp. 77, 79.

(6.) In introducing *pleadings* in Bailey's suit, in which *no judgment* was ever rendered.

Record, p. 80.

(7.) Allowing the conversation of Delafield and Clark.

Record, p. 80.

Because —

The plaintiff was shown to be a *bona fide* holder, succeeding to the title of Elliott, Collins & Co., who had been before, in an action between these parties, adjudged to be holders in good faith of these bonds, for value, and without notice of any infirmity.

And besides, all this improper evidence was *res inter alios* and could not properly affect plaintiff's rights.

2. In regarding the *certiorari* and proceedings under it as affecting plaintiff, or Elliott, Collins & Co., or the New York bankers, with notice or knowledge, or as imposing upon them the duty of *enquiry* as to *certiorari*.

Because the *judgment* of the County Judge, authorizing this bonding, and the appointment of Commissioners, under the act of 1869, was *complete* and *regular*, on the 2d of March, 1871.

And it was the duty of the Commissioners to execute the bonds "*with all reasonable dispatch*."

Sec. 4 of Act of 1869.

A. Nor did the amendment act (passed May 12, 1871,) in any respect affect the judgment of the County Judge, or the proceedings under it, as has been distinctly adjudged by the Supreme Court of New York.

Angel v. Hume, 24 N. Y. Sup. Court Rep'ts, 17 Hun., 378-9.

Prot. Epis. School, 58 Barbour, 164, and cases cited.

B. Such proceedings on *certiorari* are not competent evidence against *bona fide* holders of bonds.

People ex rel. Gray v. Phillips, 67 N. Y., 582, see Ms. Opin. of Allen, J.
People ex rel. Corwin v. Walter, 68 N. Y., 407.
Warren v. Marcy, 97 U. S., 96 to 105.
Macon v. Shores, Ib. 272.
Orleans v. Platt, 99 Ib., 676.

Even where bonds were issued in violation of injunction.

Cass v. Gillett, 100 U. S., 93.
Lexington v. Butler, 14 Wall, 283.

3. In disregarding or overruling the estoppel by judgment between these parties.

A. The learned Judge fairly recognized the cardinal doctrines of the effect of a former judgment on litigated points.

Vide his Conclusions, Record, p. 96.

B. But holds that even the *first* purchasers (Leonard & Co.), in October, 1871, as well as Elliott & Co., were not unaffected with notice of the *certiorari*, &c., because they might have ascertained, by going to the county seat, the fact of the suit of Beardsley v. Van Valkenburg, *i. e.*, the *certiorari*.

Citing M'Clure v. Oxford, 94 U. S., 429.

(Where there was no *judgment*, no *tribunal*, and *no act* in existence authorizing bonds.)

4. In declining to direct a judgment for plaintiff in error.

5. In ordering judgment for defendant in error, and denying a new trial.

POINTS.

I.

Plaintiff is a holder in good faith, without notice of any infirmity, and before maturity of this negotiable paper.

A. There is no pretence of any notice, or knowledge in the plaintiff or to either of the bankers through whose hands the bonds passed, of the least infirmity or suspicion.

B. In October, 1871, the whole issue of bonds was negotiated and passed to Leonard & Co., bankers, of Wall street, New York, for a loan of cash, $50,000.

Town of Venice v. Woodruff, 62 N. Y., 469.
Record, p. 81.

And they were *bona fide* holders.

At this time, the judgment of the County Judge was in full force and unimpaired.

"And such judgment and the record thereof shall "have the same force and effect as other judgments "and records in Courts of Record in this state."

Act of May 18, 1869, Section 2.
Harger v. Worrall, 69 N. Y., 372.
Dutchess v. Hachfield, 73 Id., 228.
Welsh v. Sage, 47 Id., 143.
Evertson v. Newport, 66 Id., 14.
Chapman v. Rose, 56 Id., 140.
Magee v. Badger, 34 Id., 247.
Henry v. Nicolay, 95 U. S., 619.

C. The loan and the bonds were then transferred about April, 1872, to Allen, Stephens & Co., bankers, who paid up the loan to Leonard & Co., and held them 4 to 6 months. They were certainly *bona fide* holders.

Record, p. 81.

D. The bonds and loan were then re-transferred to Leonard & Co.; they held them until November, 1872, when they received their pay from Elliott, Collins & Co., and transferred bonds and loan to them.

Record, p. 81.
Exh. A, B and C, p. 70.

E. Elliott, Collins & Co. thus held them for $50,000 advanced to Leonard & Co., from November, 1872, to February, 1873, when they sold them, (through Drexel & Co.,) by a broker, to the plaintiff's agent, for $54,337.50, repaying their advances and remitting the balance to the R. R. Co.

Exh. D, Record, p. 71.
Elliott's Test'y, p. 69.
Delafield's, p. 81.

About all these facts there was *no conflict* nor controversy.

II.

The proceedings on *certiorari*, instituted by Beardsley, against the County Judge, could not affect the rights of Leonard, Sheldon & Co., in October, 1871, (when they advanced their money on the bonds,) nor

could they qualify the rights of any subsequent holder, deriving title through them.

Ins. Co. v. Hachfield, 73 N. Y., 228, and cases cited.

A. Those proceedings were "*res inter alios.*" Neither the Town of Lansing, the Railroad Co. nor Leonard & Co., were represented in those proceedings, nor in any respect bound by them.

People ex rel. Gray v. Phillips, 67 N. Y., 582.
Corwin v. Walter, 68 N. Y., 407-8-9.
Warren v. Marcy, 97 U. S., 96-105.
Macon v. Shares, Ib., 272.

Says the Court of Appeals (75 N. Y., 404), speaking of a case where the affidavits of the Assessors stood in place of the adjudication of the County Judge: "The production of the record of reversal "would not be an available defense to any action on "the bonds or coupons. The affidavit of the As- "sessors would be an important muniment of their "security. It is by law evidence of the validity of "their demands against the town, and they could "not be deprived of its benefit by an adjudication "between other persons, to which neither they (the "bondholders) nor the town were parties. These "were *res inter alios acta*, and could have no effect "upon their rights. It appears that when the bonds "were issued, the proceedings and affidavit were in "full force."

B. Had the decision of the *certiorari*, by Supreme Court (3d Dep't), in May, 1872, affirmed the proceedings below, it would not have been evidence for either party in an action on the bonds.

No duty on the part of purchaser to go up to Ithaca to examine records.

Block vs. Comm'rs, 99 U. S., 693, 696.
Same authorities, *supra.*

C. The doctrine of *lis pendens* has no application here. It is true, that if an injunction had been obtained, the issuing of bonds might easily have been restrained, as is pointed out in

Orleans v. Platt, 99 U. S., 681.
Act of May 12, 1871, Sec. 5.
Warren v. Marcy, 97 U. S., 96.
Lyons v. Munson, Ib., 684.
Ray v. Van Sickle, 96 U. S., 675.

D. Or if a mere notice had been published in a New York paper, doubtless Messrs. Leonard and Co. would not have invested in the bonds.

E. It seems that the Commissioners before issuing the bonds, took very careful and competent legal advice from Judges BOARDMAN and FINCH.

Record, p. 80.

And the remark about "*violation of good faith*," in issuing these bonds (found in the opinion of Wallace, J., Record, p. 85,) is hardly fair to the Commissioners.

(The Judge probably misapprehended the office and effect of a merely *reviewing* writ of *certiorari.*)

F. The whole subject of the effect of serving the writ (after a *completed* judgment), for a mere *review*, in New York, is found,

Payfer v. Bissell, 3 Hill, 240, Cowen, J., reviewing.
The People, &c., 1 Wend., 81.
Blanchard v. Myers, 9 Johns., 66.
Springport v. Teutonia, 75 N. Y., 405.

showing that a *certiorari* by itself, without any bail bond, or special order of Court, or other *supersedeas*, does not affect *other officers*, and its whole effect is upon the subordinate tribunal to compel a *return* for the purpose of review.

Also Leitch v. Wells, 40 N. Y., 585.

Jurisdiction ended with completed duty.

82 N. Y., 276.

The whole subject carefully reviewed, and authorities collated, recognizing the distinction between a *certiorari to remove pending proceedings* and one issued (as in this case) merely for *review* of *completed* proceedings.

Patchin v. Brooklyn, 13 Wend., 666.
Corwin v. Walter, 68 N. Y., 411.

G. Doubtless the Commissioners were advised by Judges Boardman and Finch, that the writ not being directed *to them*, and the statute requiring them to proceed "*with all reasonable dispatch*" to execute the bonds and subscribe for the stock, it was their duty to do so, inasmuch as they had been appointed, in December previous, by the County Judge, whose duty it was to appoint "*forthwith*," and no injunction or stay whatever had been served upon them.

Orleans v. Platt, 99 U. S., 681.
Lyons v. Munson, Ib., 685.
Sections 4 and 5, Act of May 18, 1869.

(According to the practice in New York, anybody, upon affidavit of error, can obtain at any special term of Supreme

Court, *ex parte*, a writ of *certiorari* for mere *review* of a completed proceeding in a subordinate tribunal.)

(2 Abbott Pract. & Pl'd'gs, 713, 715.
2 Rev. Stat., 573, Sec. 69.
People ex rel. Caldwell v. Kelly, 35 Barb., 444.)

This case is, therefore, brought fairly within the doctrines of

Warren v. Marcy, 97 U. S., 96.
Orleans v. Platt, 99 Ib., 676.
Lyons v. Munson, Ib., 684.
Cass v. Gillett, 100 Ib., 93.

OF ESTOPPEL BY JUDGMENT.

III.

The plaintiff having heretofore recovered judgment in the Circuit Court, for all the July, 1873, interest on *these bonds* (one coupon from each bond), where defendants appeared, answered and litigated the validity of the *bonds*, and every other question involved here; that judgment remaining unreversed and in full force, defendants are estopped to set up these defenses.

Beloit v. Morgan, 7 Wall., 622.
Aurora v. West, Ib., 96, 619.
Campbell v. Rankin, 99 U. S., 263.
Cromwell v. Sac. Co., 94 Id., 351, and cases cited.
Davis v. Brown, Ib., 428.

A. Clemens v. Clemens, 37 N. Y., 74, where the rule is stated :

"Conclusive between the same parties, or others "claiming under them, not only as to the matters "actually determined, but as to every other matter "which the parties might have been litigating and "have had decided, as incident to, or essentially "connected with the subject-matter of the litigation, "within the legitimate purview of the original "action, whether of claim or of defense."

Same Doctrine, Davis v. Brown, *supra.*
So in 75 N. Y., 153.
37 Id., 74.
77 Id., 79.

B. And this, whether the party resisting the estoppel, did or did not, could or could not *appeal* from the estopping judgment to a higher Court.

Bellinger v. Craigue, 31 Barb., 536, and cases cited.
Hallock v. Dominy, 69 N. Y., 240.
Gates v. Preston, 41 N. Y., 114.
Smith v. Hemstreet, 54 Ib., 644.
White v. Coatsworth, 6 Ib., 143, citing Dutchess of Kingston's case.
Outram v. Morewood, 3 East., 346, and many cases.
Gardner v. Buckbee, 3 Cowen, 120.
Blair v. Bartlett, 75 N. Y., 152.

C. Same doctrine substantially held in

Cromwell v. Sac, 94 U. S., 351.

Although an *independent defense*, not set up nor tried (nor in the condition of the pleadings proper to be tried), may not be estopped, as in

Davis v. Brown, 94 U. S., 428.
Malloney v. Horan, 49 N. Y., 117.

D. It will be observed that the former judgment, although pleaded and set forth in the Declaration (Record, p. 39), *is not answered or noticed in the answer.*

Record, p. 41, &c.

E. The defenses set up were substantially the same.

Compare Record, pp. 41, &c., with 59, &c.

ANSWERS.

FIRST SUIT.	SECOND AND THIRD.
1. Non assumpsit.	1. Non assumpsit.
2. General denial.	2. General denial.
3. Beardsley's *certiorari* and reversal, in May, 1872.	3. Signatures to consents induced by fraud and false pretence.
4. Insufficient signatures to consents, and non-existence of R. R. Co., the gravamen of the reversal on *certiorari*, and notice to the Commissioners and the R. R. Co.	4. R. R. Co. not duly organized — no valid existence. Petitions insufficiently signed by tax-payers, not a majority. No proofs sufficient before the County Judge and he had no jurisdiction to entertain the application.
5. Bonds were wrongfully issued, and R. R. Co, never acquired title to them. Plaintiff acquired title without valuable consideration, and had full notice.	5. Beardsley's *certiorari* and reversal in Supreme Court, May, 1872, and notice of it to R. R. Co. and Commissioners.
	6. Plaintiff had full notice thereof and paid no consideration.
	7. Plaintiff bought after reversal, with full knowledge and notice.

Neither answer set up the lack of seals to the bonds. Although litigated at the first trial (Record, p. 87, Judge Wallace's decision), plaintiff had no reason to suppose that it would be again litigated, and had no witnesses present.

F. Of all these defenses, no evidence whatever was offered, except as to

No. 5, Beardsley's *certiorari.*

Lack of seals to bonds not pleaded.

Both of which were disposed of by former judgment.

G. Whether the County Judge acquired *jurisdiction* upon the petitions presented him (verified by Jas. A. Burr, Record, p. 47,) is again questioned.

To which there are *three* sufficient answers, viz.:

1. The verified petition of Burr is strictly according to statute, which says, "*verified by one of the petitioners.*"

2. "Jurisdiction" is conferred by the statute and not by the petition.

Town of Venice v. Murdock, 215.
Hallock v. Doming, 69 N. Y., 240.

In Miller v. Adams, 52 N. Y., 415, it is held that a magistrate has "jurisdiction" to make an erroneous decision.

Elementary principles appear in R. R. Co. v. Supervisors, 48 N. Y., 98, 99.

See Rh. Isld. v. Massach, 12 Peters, 718.
Elliot v. Pearsall, 1 Peters, 328, 340.
Wilcox v. Jackson, 13 Peters, 511.

"Where the proof has a legal tendency to make "out a proper case, although slight and inconclu- "sive, the process is valid until set aside."

Miller v. Brinkhff., 4 Denio, 118.
Staples v. Fairchild, 3 N. Y., 41.
Skinnion v. Kelly, 18 N. Y., 355.

3. The fact of jurisdiction was duly adjudged in the former case by Judge Wallace.

He says (Record, pp. 86, 87), "The proceedings "were sufficient to call for the exercise of judicial "judgment, and * * * in favor of a *bona fide* "holder, conclusive."

The *legal existence* of the R. R. Co. was established.

The road has been running ever since 1872.

Record, p. 87.
Act of Legisl., ch. 314 of 1869.
Cayuga Lake R. R. Co. v. Kyle, 64 N. Y., 186.
Vide Opinion of Wallace, J., Record, p. 87.

We ask, therefore, that this judgment be reversed, and the cause remanded for new trial.

JAS. R. COX,
of Auburn, N. Y.,
Att'y and of Counsel for Pl'ff.

GROVE & BAILEY, Law Printers, Observer Office, Utica.

SUPREME COURT U.S.
FILED
NOV 30 1881
JAMES F. McKENLEY, CLK

United States Supreme Court.

No. 184.

JOHN J. STEWART, PLAINTIFF IN ERROR,

vs.

THE TOWN OF LANSING, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE DEFENDANT IN ERROR.

The case is brought before this Court by writ of error to the Circuit Court of the United States for the Northern District of New York, prosecuted by the plaintiff below to review a judgment upon a verdict ordered by the Court in favor of the defendant below. (Page 100.)

Two suits were commenced by the plaintiff against the defendant in said Circuit Court.

The one was commenced in September, 1875. (Pages 1 and 35.)

This suit is designated in the record as No. 2. It was brought to recover the amount of seventy-five coupons (which are set out in the declaration) for thirty-five dollars each, payable to bearer on the 1st day of January, 1874. They amount to

$2,625, for which sum, with interest thereon from January 1st, 1874, the plaintiff demands judgment. (Pages 4 to 35, inclusive.)

The pleas or answer of the defendant in this action is at pages 41 to 43. This denies each and every allegation of the declaration. (See second answer, page 41.) It alleges that the bonds mentioned and the coupons set out in the complaint were unauthorized and void. (See third and fourth answers, pages 41 and 42.) It further alleges that the plaintiff did not part with any valuable consideration for the bonds or said coupons, and that he had notice of their invalidity. (Fifth answer, pages 42 and 43.)

Afterwards, and in August, 1876, the plaintiff brought another suit, designated in the record as No. 3. The declaration in this suit is at pages 36 to 40, inclusive.)

In this suit the plaintiff claims to recover seven installments of interest, each amounting to $2,625, viz., for the coupons which became due July 1st, 1872, January 1st, 1873, July 1st, 1874, January 1st, 1875, July 1st, 1875, January 1st, 1876, and July 1st, 1876. These amount to $18,375, for which amount, with interest, judgment is demanded in this suit. (See declaration, bottom of page 39 and page 40.)

The two suits were consolidated and tried as one. The answer in the first suit was made applicable to the one last-above mentioned. (See stipulation of October 6, 1876, page 43, and judgment, page 45.)

The consolidated suits were tried by and before Judge Wheeler and a jury, in June, 1877. The jury, under the direction of the Court, rendered a verdict for the defendant. A motion for a new trial was made and denied; and judgment was entered for defendant, with costs against the plaintiff. (Pages 43, 44 and 45.)

The Bill of Exceptions extends from the top of page 47 to and including page 87.

The plaintiff gave the evidence set out at pages 47 to 71, and rested.

The defendant then gave the evidence set out from page 71, folio 164, to page 80, folio 194, and rested.

The plaintiff then gave the evidence set out from page 80, folio 194, to page 83, folio 202.

The counsel for the defendant insisted and requested the Court to rule and decide as stated on page 83, folio 203, to page 84, folio 206.

The plaintiff's counsel insisted and requested the Court to rule and decide as stated on page 84, folio 206.

The Court declined to rule and decide as requested by the counsel for the plaintiff, and directed the jury to render a verdict for the defendant; and the counsel for the plaintiff excepted. (Page 84, folios 206 and 207.)

There were of the bonds in question seventy-five, numbered from one to seventy-five, inclusive. They were all dated October 1st, 1871; they were for $1,000 each, with interest from January 1st, 1872, payable semi-annually on the first days of July and January. Coupons were attached to each bond for the semi-annual interest thereon. (See pages 53 and 54.)

The bonds purported to have been made and issued under and by virtue of Chapter 907 of the Laws of New York of 1869, passed May 18th, 1869. (See Laws of New York for 1869, vol. 2, p. 2303, &c.

The first and second sections of said act are as follows:

SECTION 1. Whenever a majority of the tax-payers of any municipal corporation in this State, whose names appear upon the last preceding tax list or assessment roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the County Judge of the county in which such corporation is situated, by petition verified by one of the petitioners setting

forth that they are such a majority of tax-payers and represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, (but not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax list and assessment roll,) and invest the same or the proceeds thereof in the stock or bonds (as said petition may direct) of such railroad company in this State as may be named in said petition, it shall be the duty of said County Judge to order that a notice shall be forthwith published in some newspaper in such county, or if there be no newspaper published in said county, then in some newspaper printed in an adjoining county, directed to whom it may concern, setting forth that, on a day therein named, which shall not be less than ten days nor more than thirty days from the date of such publication, he will proceed to take proof of the facts set forth in said petition as to the number of tax-payers joining in such petition, and as to the amount of taxable property represented by them. And any solvent, moneyed, manufacturing or other corporation or company formed under the laws of this State, and being assessed on real or personal property therein, shall have all the rights and privileges under this act so far as property representation is concerned, as other tax-payers. And the board of directors or trustees of any such corporation or company may apply to the County Judge by petition in the same manner as herein provided for other tax-payers. The words "municipal corporation," when used in this act, shall be construed to mean any city, town or incorporated village in this State. But nothing herein contained shall be construed as to include the city or counties of New York, Kings, Erie, Greene, Albany, Westchester, Ontario, Seneca, Yates, Onondaga and Niagara.

SECTION 2. It shall be the duty of the said Judge, at the time and place named in the said notice, to proceed to take proofs as to the said allegations in said petition; and if it shall appear satisfactorily to him that the said petitioners, or the said petitioners and such other tax-payers of said town as may then

and there appear before him and express a desire to join as petitioners in said petition, do represent a majority of the taxpayers of said municipal corporation, as shown by the last preceding tax list or assessment roll, and do represent a majority of the taxable property upon said list or roll, he shall so adjudge and determine, and cause the same to be entered of record. And such judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in this State.

First. The Town of Lansing is a corporation for certain municipal and political purposes. As such it had no capacity or power to make or issue the bonds in question. Unless the County Judge of Tompkins County had jurisdiction under the act of 1869 to appoint the commissioners who made and issued the bonds, they and the coupons attached are void as against the Town. To entitle the plaintiff to recover, he was bound to establish that the Judge acquired jurisdiction to appoint the commissioners. This was an essential part of his case.

1*st R. Statutes of N. Y.*, 6 *Ed.*, *p.* 820, *Secs.* 1, 2 *and* 3.
Lorrillard v. The Town of Monroe, 11 *N. Y. Reports*, 392, 393, 394, *&c.*, *per Denio, J.*
McClure v. Township of Oxford, 94 *U. S. Reports*, 429.

Second. The judgment and appointment of commissioners by the County Judge were void, because the County Judge did not acquire jurisdiction to make the same. This appeared on the face of the record made by the County Judge.

I. The County Judge is invested with a special limited statutory power. The presentation to him of the petition prescribed by the statute, is essential to his jurisdiction to act in the matter. Unless the petition states what the statute requires shall be stated in it, the County Judge has no power to act, and his proceedings are void.

Chapter 907 *of the Laws of New York for* 1869, *vol.* 2, *p.* 2303.
Thatcher v. Powell, 6 *Wheaton*, 119.
People ex rel. Rogers v. Spencer, 55 *N. Y. R.*, 1–4.
People ex rel. v. Smith, 55 *N. Y. R.*, 135–138.
Bloom v. Burdick, 1*st Hill*, *N. Y. R.*, 130.
Sharp v. Spier, 4 *Hill*, *N. Y. R.*, 76.
McClure v. Oxford, 94 *U. S. R.*, 429.

II. The petition in the case in question is totally defective. It does not state the facts required by the statute to be stated therein to give the County Judge jurisdiction.

See Statute, supra.

The petition is set out on page 74 of record, and is as follows:

"*To the Hon. W. Van Valkenburgh, County Judge of Tompkins County:*

The petition of the undersigned residents and others whose names appear upon the tax-list and assessment roll of the Town of Lansing, in said County, as owners or representing certain taxable property in the corporate limits of said Town, respectfully shows that the said petitioners desire that the said Town of Lansing shall create and issue its bonds to the amount of seventy-five thousand dollars, and to invest the same or the proceeds thereof in the stock or bonds, or both, of the Cayuga Lake Railroad Company, in pursuance of an act of the Legislature of the State of New York, entitled "An act to amend an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2d, 1850, so as to permit mu-

nicipal corporations, &c., &c., passed May 18th, 1869. (Chap. 907, Laws of 1869.) And in furtherance of the objects of said act, we have hereunto signed our names, at the said Town of Lansing."

1st. It does not state or set forth that the petitioners are a "majority of the tax-payers" of the Town whose names appear on the last preceding tax list or assessment roll, or that they "represent a majority" of the taxable property in the corporate limits of the Town.

See sec. 1 *of Statute, supra.*

The language and meaning of the statute are clear that the County Judge acquires jurisdiction to act only "wherever a majority of the tax-payers of any municipal corporation whose names appear upon the last preceding tax list or assessment roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the County Judge by petition verified by one of the petitioners, *setting forth that they are such a majority of tax-payers and represent such a majority of taxable property*, * * * it shall be the duty of said County Judge to order that a notice be forthwith published, * * * setting forth that on a day therein named * * * he will proceed to take proof of the facts set forth in said petition as to the number of tax-payers joining in such petition, and as to amount of taxable property represented by them." (See section 1 of said law of 1869.)

Section 2 of said law of 1869 enacts, "That it shall be the duty of the said Judge, at the time and place named in the said notice, to proceed to take proofs as to the said allegations in said petition; and if it shall appear," &c.

This statute authorizes a special summary proceeding by the County Judge, whereby burdens may be imposed upon parties and their property taken from them without their consent. In such cases the general rule of law is, that the proceedings pre-

scribed by the statute should be strictly pursued, and the facts which give jurisdiction should be stated as prescribed by the statute, else the adjudication by the officer is void:

The language of Chief Justice Marshall, in *Thatcher v. Powell, in* 6 *Wheaton*, 119, above cited, is:

"The argument is, that the judgment, for these errors in the proceedings of the County Court, may be voidable, but is not void; that until it be reversed, it is capable of supporting those subsequent proceedings which were founded on it.

"We think otherwise. In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*. Without this act of assembly, the order for sale would been have totally void. This act gives the power only on a report to be made by the Sheriff. This report gives the court jurisdiction; and without it, the court is as powerless as if the act had never passed."

In the case of *Bloom v. Burdick*, 1*st Hill N. Y. Reports*, *supra*, it is adjudged that a statute authority by which one may be deprived of his property, must be strictly pursued; and that where a statute prescribes the mode of acquiring jurisdiction, the mode must be complied with, or the proceeding will be a nullity.

See 1*st Hill*, 130, 131.

In *Sharp v. Spier*, 4 *Hill*, *supra*, the same principles are affirmed. (See same, p. 76–77–86–87.)

The Court of Appeals of New York have decided that under the statute in question the jurisdiction of the County Judge is based upon a proper petition, and if any fact required to be stated is omitted, all subsequent proceedings are void. That the existence of the fact, or the bringing of it to the knowledge of the officer in some other way, or at some other stage of the

proceedings, than by the petition, does not aid the proceeding. It is material, because the statute requires it, and must be presented in the form and at the time prescribed to give the officer jurisdiction.

The People ex rel. Rogers v. Spencer, 55 *N. Y. R., pp.* 1, 4 *and* 5.

People ex rel. v. Smith, 55 *N. Y. R., p.* 135–138.

2d. The statute in express language requires that the bonds, or the proceeds thereof, shall be invested "in the stock or bonds (as said petition may direct) of such railroad company in this State as may be named in said petition." (See section 1 of said act of 1869, vol. 2, p. 2303, 2304, of the Laws of New York for 1869.)

Section 5 of the same act (vol. 2 of same laws, p. 2306,) enacts as follows:

"Such commissioners are further empowered and directed to subscribe in the name of the municipal corporation which they represent to the stock or bonds of the railroad company named in such petition (as the petition may direct) to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the said bonds therefor at par; or they may, at their discretion, sell and dispose of the said municipal corporate bonds so created by them at rates not less than par, and invest the proceeds thereof in such stock or bonds of such railroad company as may be directed in said petition."

The petition presented to the County Judge does not direct or intimate whether the bonds or their proceeds shall be invested in the bonds or stock of the railroad company. The petition states that the petitioners desire that the Town create and issue its bonds to the amount of $75,000, and invest the same or the proceeds thereof in "the *stock* or *bonds*, or *both*," of the railroad company named pursuant to said act, chapter 907 of the Laws of 1869. (See petition, p. 74 of record, set out above.)

It was a material jurisdictional matter under this statute that the petition should direct or state how the bonds or their proceeds should be invested, whether in bonds or stock of the railroad. This important matter should not be left to the discretion of the commissioners. The statute in express terms prescribes otherwise.

III. The above mentioned defects in the petition appear on the face of the adjudication and the appointment by the County Judge of the commissioners who signed and issued these bonds. The adjudication and appointment of commissioners were made March 2d, 1871. (See page 49 of record, folio 96.)

The same, with the petition and other papers, was filed and made a record in the County Clerk's office of Tompkins County, March 21st, 1871. (See page 74 of record.)

The adjudication recites that "the petition of James A. Burr and others, tax-payers of the Town of Lansing, having been presented to me, the County Judge of Tompkins County, on the 10th day of December, 1870, which petition sets forth and alleges, among other things, *that the names of said petitioners appear upon the tax list and assessment roll of said Town of Lansing, as owning or representing certain taxable property* in the corporate limits of said Town; and that said petitioners desire that said Town of Lansing shall create and issue its bonds to the amount of seventy-five thousand dollars, and invest the same or the proceeds thereof in the *stock or bonds, or both*, of the Cayuga Lake Railroad Company." (Record, page 49, folio 96.)

The said County Judge adjudges and determines, among other things, that bonds to the amount of seventy-five thousand dollars be issued for investment of the same or the proceeds thereof in *the stock or bonds, or both*, of the Cayuga Lake Railroad Company. (Page 50, folio 101.)

He further adjudges and determines that "it is expedient and proper that three persons, who are freeholders, residents and tax-payers within the corporate limits of said Town of Lansing be appointed and commissioned as commissioners for the purposes specified and contemplated *in said petition.*" (Page 51, folio 101.)

He also appoints and commissions the three persons, naming them, who signed and issued the bonds in question, and declares that it shall be their duty "to cause to be made and executed the bonds of said Town of Lansing to the amount and for the purposes *set forth in said petition.*" (Page 51, folio 102.)

The adjudication does not even recite that the petition *sets forth or states* that the petitioners are a "majority of tax-payers," or that "they represent a majority of taxable property," as required by the statute. (See section 1 of same.)

On the contrary, the adjudication recited the defective and insufficient statement of the petition on this subject. (Record, page 49, folio 96, quoted above.)

IV. The County Judge could not acquire jurisdiction by taking proof and adjudicating on these questions. The first section of said act declares that the petition shall set forth that the petitioners are a majority of the tax-payers, and that they do represent a majority of the taxable property; and that the County Judge shall give notice that at the time and place specified therein "he will proceed to take proof of *the facts set forth* in said petition as to the number of tax-payers joining in said petition, and as to the amount of taxable property represented by them."

The second section of the act declares, "It shall be the duty of the said Judge at the time and place named in the said notice to proceed to take proof as to the said allegations in said petition."

If, by his adjudication, he could cure the jurisdictional defects in the petition in question, he could make a valid adjudication and appointment without the presentation of any petition to him by tax-payers. This will hardly be claimed.

See the cases above cited in 35 *N. Y. R., p.* 1, *and* 55 *N. Y. R., p.* 135.

V. The objections to the petition and the proceedings by the County Judge above mentioned, were raised by the defendant's counsel on the trial when the plaintiff's counsel offered the adjudication and appointment of commissioners by the County Judge in evidence. (Offer, page 47 to 51 inclusive, of the record. Objections and exceptions to the admission of the same, page 52.)

The same objections were made to the reading of the bonds and coupons in evidence, which was overruled and an exception taken. (Record, page 53.)

After the defendant had given his evidence, and at the close of the case, the same and additional objections were raised and insisted upon. (Record, page 83.)

Third. The bonds were invalid in the hands of the railroad company. This railroad company procured the commissioners by indemnifying them to make and issue these bonds to it with actual notice of the alleged defects in the petition and proceedings of the County Judge and of the pending proceedings by certiorari, by which the adjudication and appointment of commissioners by the County Judge were soon after annulled and set aside.

I. The adjudication of the County Judge and accompanying papers were filed in the Clerk's Office of Tompkins County, on the 21st of March, 1871. (Record, page 49, 50, 51. Do. page 74.)

On the 27th of March, 1871, a writ of certiorari was allowed and issued by the Supreme Court of the State of New York, to remove and review the proceedings and adjudication of the County Judge. The writ was served on the County Judge. He made his return thereto on the 1st day of September, 1871. (Record. pages 71, 72.)

The Supreme Court, at a General Term thereof, ordered judgment, reversing and annulling the decision and adjudication of the County Judge. This judgment was entered of record in the Clerk's Office of Tompkins County, on the 27th day of May, 1872. (Record, pages 73–4; fol. 172.)

The commissioners appointed by the County Judge did not take the oath of office until August 31st, 1871, long after the certiorari was issued and served. (Record, page 71.)

II. The commissioners and the railroad company had notice of the proceedieg by certiorari before any bonds were signed and issued.

The bonds were dated October 1st, 1871. (See record, page 54, fol. 112.)

They were issued on or about October 14th, 1871. (Testimony of Clarke, page 54, fol. 113; also page 81, near top.)

Before, and at the time the bonds were issued to the railroad company, the pending proceedings by certiorari were talked about between the commissioners and the officers of the company; and the company gave the commissioners a bond to indemnify them against all damages, &c., by reason of their acting as such commissioners in subscribing for capital stock in

the company and issuing to the company the bonds therefor. (Record, page 76, fol. 181; also pages 77, 78 and 79; also page 55, fols. 115, 116.)

III. The legal effect of the issuing and service of the certiorari was to stay or suspend the exercise of power by the commissioners until after the decision of the Supreme Court.

Launitz vs. Dixon, 5 *Sandford S. C. R.*, (*N. Y.*) 249.
Connor vs. Develin, 26 *Barbour R.*, (*N. Y.*,) 429.

Fourth. Where, as in the case at bar, it is shown that negotiable paper was made and put in circulation illegally and in fraud of pending legal proceedings to annul and set aside the colorable authority to make and issue the same, the *burden* is upon a party claiming to recover upon it as an innocent holder to prove affirmatively that he gave value for it and had no notice that it was issued illegally or of the pending legal proceedings to annul it.

Smith v. Lac County, 11 *Wallace*, 139, 146–7.
Vallett v. Parker, 6 *Wendell*, 615, 621, 622.
Rogers v. Morton, 12 *Wend.*, 484, 487.
Farmers, &c., Bank v. Noxon, 45 *N. Y.*, 762, 765.
Comstock v. Hill, 73 *N. Y.*, 273, *per Allen, J.*

Fifth. The evidence did not show or authorize a finding that the plaintiff was a *bona fide* holder of the bonds and coupons for value parted with.

The petition and record in the Clerk's Office were legal notice to all parties dealing in the bonds or coupons that they were issued without legal authority.

I. Each bond, on its face, stated that it was issued by virtue of the act of the Legislature of New York, 1869, giving correctly the title of the act and the date of its passage. (Record, page 53, fol. 111.)

The bonds were numbered from 1 to 75 inclusive. (Page 53, near top.) Each coupon referred by the number to the bond to which it had been attached. (Page 54, fol. 113)

The bonds, on their face, purported to be made by the three persons signing them as commissioners under the act referred to for the Town of Lansing, in the County of Tompkins. (Record, page 54.)

The bonds and coupons on their face gave legal notice to every one proposing to deal in them of the statute by virtue of and according to the provisions of which alone they could be rightfully made and issued. Each party receiving them was bound to take notice of the requirements of the statute at his peril.

McClure v. Township of Oxford, 94 *U. S. R.*, 429.

The statute informed every one that no valid bonds could be issued unless the petition required by the statute to give the County Judge of Tompkins County jurisdiction to act was presented to him.

The statute informed every one that the petition and decision of the County Judge were required to be on file in the Clerk's office of Tompkins County, as public records. (See section 2 of the act.) They, in fact, were on file and of record there before these bonds were issued.

Parties before dealing in the bonds were bound to examine this record. If the petition and the recitals in the adjudication of the County Judge on file show that he did not acquire jurisdiction under the statute, then all parties dealing in the bonds or coupons are legally chargeable with notice of that fact, and cannot recover upon them.

See 94 *U. S. R.*, 429–432.

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See 94 *U. S. R.*, 429-432.

The petition and adjudication, the record in this case, did show that the County Judge did not have jurisdiction to make the adjudication and appoint the commissioners.

See Point Second, subdivision II, *supra*.

When the bonds were issued to the railroad company in October, 1871, the certiorari had been issued and served on the County Judge, and returned to the Supreme Court. (Pages 71 and 72.) And at all times after May 27th, 1872, the record in Tompkins County showed that the proceedings before, and adjudication and appointment of commissioners by, the County Judge had been annulled and set aside. (Page 73 near bottom, and page 74 at top.)

The case at bar is not within the principle applied in the case of *Town of Coloma v. Eves*, 92 *U. S. R.*, *p.* 484, and other like cases.

In these cases, power is given by statute to a municipality, or to its officers, to issue bonds in payment for stock on some precedent condition, such as a popular vote in favor of the measure, and where it may be gathered from the statute that the officers of the municipality are invested with power to decide whether the condition has been complied with or not. In such cases the acts of the officers and the recitals in the bonds issued by them, are evidence against the municipality in favor of a *bona fide* holder of the bonds.

II. The evidence was not sufficient to authorize a finding either that the plaintiff parted with value for the bonds or coupons, or that he received them without notice of the defect in the proceedings to authorize them, or of the certiorari. On the contrary, the evidence given and the omission to give testimony within the power of the plaintiff on these points, casts suspicion on the plaintiff's case.

Neither the son or any member of the firm who had personal knowledge of how or by whom the loan was paid, or to whom the bonds and coupons were then delivered, was examined as a witness by the plaintiff. It appears in the case that Mr. Cox, the attorney for the plaintiff, had united with Delafield, the treasurer of the railroad company, in urging the commissioners to issue the bonds, notwithstanding the pendency of the proceedings by certiorari. (Record, page 77, fols. 182, 183.)

He was called as a witness on the trial for the plaintiff. His testimony is on pages 64, 65 and 66 of the record. He gives no information as to the plaintiff or as to how or from whom the bonds or coupons came into his possession as attorney. (See his testimony, page 64, &c.)

It appears in the case that in 1872, a suit was brought in said Circuit Court to recover the amount of the 75 coupons which became payable July 1st, 1872. (Page 80.) Mr. Cox was the attorney for the plaintiffs in that case. (See his testimony, page 64, fol. 145, to page 166 inclusive.) In that case there was a decision in favor of the defendant on the merits. (Page 79, fol. 190; page 80. Decision in former suit, page 85.)

These same coupons which fell due July 1st, 1872, were sought to be recovered in the present suit. (See declaration in suit No. 2, page 39, fol. 60.)

Mr. Cox cannot tell how these coupons came to the posession of Stewart, the plaintiff, nor from whom he received them. (See his testimony, page 64, &c.)

III. It is submitted, that on the facts, circumstances and testimony in the case, the Court did not err in refusing to direct a verdict for the plaintiff as requested by the plaintiff's counsel. (See record, page 84.) Nor did the Court err in directing a verdict for the defendant. (Page 84, fol. 206.)

The counsel for the plaintiff did not request the Court to submit any question to the jury.

Sixth. The bonds were and are void, because they were not executed by the commissioners under seal, as required by the statute authorizing them to be made. (See section 4 of the said act of 1869, vol. 2 of Laws of 1869, p. 2305.) In fact, the individual seals which appeared on the bonds at the trial were wrongfully affixed to them by some one after they were issued, without the knowledge or consent of the commissioners. This objection was taken at the trial. (Record, pages 83–84.)

I. The statute in express terms declares that the commissioners shall "cause to be made and executed the bonds of such municipal corporation, attested by the seal of such corporation affixed thereto, if such corporation has a common seal; and if not, then by their individual seals, and signed and certified by said commissioners, who are hereby authorized and empowered to affix such common seal thereto, and to so sign and certify such bonds." (Section 4 of act of 1869, *supra.*)

II. There is not a word of testimony to prove that the corporation had not a common seal. It rested upon the plaintiff to prove this fact to make the bonds valid, even had the commissioners affixed their individual seals to the bonds.

McClure v. Township of Oxford, 94 *U. S. R.*, 429.

III. But it was clearly proved that the commissioners never affixed their individual seals to the bonds, or assented thereto. (Testimony of Clark, one of commissioners, called by plaintiff, page 54, and cross-examination, page 55, folio 115. Testimony of Hall, another of the commissioners, page 77, near top. Testimony of A. W. Kettles, a brother of the third commissioner, who had died, page 79. Testimony of Torbell, the County Clerk of Tompkins County, who registered the bonds after they had been pledged as collateral to parties in New

1st. By the laws of New York and of the United States, the plaintiff was a competent witness in his own behalf on these questions. He could have proved when he took the bonds and coupons; from whom he received them; what if any consideration he parted with for them; and whether he took them without notice, in fact, of the defects in the proceedings to authorize their issue, or of the certiorari proceedings.

(1.) There is not a word of testimony to prove where the plaintiff did or does resides. All we know about him is that the declaration describes him as "a citizen of the State of Louisiana, plaintiff in this action." (Page 1, folio 1; page 36, folio 45.)

There is no testimony when he received any of the bonds or coupons in question, or from whom he received them, or that he paid or parted with anything for them, or received them upon any valuable consideration. Nor is there any testimony that he had not full notice and knowledge of the certiorari proceedings and the defects in the proceedings by the County Judge.

(2.) The testimony to prove what became of the bonds and coupons after they were delivered to the railroad company, was given by Mr. Cox and Mr. Elliott, sworn before the plaintiff rested, and Mr. Delafield, who was called after the defendant rested.

Mr. Delafield's testimony extends from page 80, folio 194, to page 83, folio 203. He testified that he was the treasurer of the railroad company, and had charge of the finances and the bonds. That soon after he received them from the commissioners, in October, 1871, he obtained a loan for the railroad company of $50,000 from Leonard Sheldon & Co., bankers in the city of New York. That the bonds were held by these and other bankers named, in New York, till in November, 1872,

when this loan was paid, and a loan was made from Elliott, Collins & Co., of Philadelphia, by the railroad company, and the bonds and coupons transferred to them as collateral security. (Testimony, folio 194, pages 80 and 81; page 82, folio 198.) That this firm were the bankers of the railroad company. (Page 81, folios 195–6.)

He testified that he had no personal knowledge of the sale of the bonds. That he never saw Stewart, the plaintiff, and did not know there was any such man. (Page 82, folio 199.)

The plaintiff's counsel read in evidence two depositions of William Elliott, of the firm of Elliott, Collins & Co., taken in Philadelphia, the one July 18th and the other August 26th, 1876. (Pages 66 to 69.)

In his first deposition he testifies that his firm made a loan to the railroad company on the 26th of November, 1872, on the company's notes, at four months, with the 75 bonds, with coupons attached, as collateral security. This was after the proceedings by and before the County Judge had been reversed. That they never sold the bonds; that in February, 1873, they received their pay and parted with the bonds. (Fols. 151–152; notes, page 70.) All the negotiations were with Delafield, the treasurer. That he had no acquaintance with Stewart, the plaintiff; and that Stewart had never had any transactions with the witness or his firm, to his knowledge. (Page 68.)

In the second deposition the witness is shown a paper, marked Ex. D, and testifies that this is a statement of the sale of the bonds by his firm in February, 1873. (Page 68, folio 156–157, and Ex. D, page 71.)

But on his cross-examination it appears that he has no personal knowledge as to any sale of the bonds to any one. That Ex. D is in the handwriting of his son, A. W. Elliott. That the witness never saw it till the day of this second examination. That his son was then living in Philadelphia. (Page 69.)

York, page 75, folio 177. Testimony of Delafield, page 82, near bottom, and page 83.)

There was no conflict of testimony on this question.

IV. The bonds were void in the hands of any one, for the reason that they were not executed by the commissioners as required by the statute; and because they had been materially changed, wrongfully, after they were issued by the commissioners. The affixing of a seal to a simple contract changes materially its legal effect.

Avery v. Town of Springport, 14 *Blatchford*, 272.
Anthony v. County of Jasper, 101 *U. S. R.*, 693–7–8.
McClure v. Township of Oxford, 94 *U. S. R.*, 429.
Tiffany v. Lord, 65 *N. Y.*, 310–312.

Seventh. The former judgment in favor of the plaintiff against the defendant is not on the evidence in this case conclusive that the plaintiff is entitled to recover herein. The claims or causes of action in the former suit were distinct and different claims or causes of action from those upon which the present actions are brought.

I. The former suit was upon the 75 negotiable coupons falling due on the 1st day of July, 1873, and 75 similar coupons falling due on the 1st day of January, 1874. Each coupon was counted upon as a distinct cause of action. (Complaint in former suit, page 59.) In that action the bonds were not set out. (See complaint, page 56, &c.) That suit was commenced in March, 1874. (Page 56.) The plaintiff in that action recovered upon the coupons falling due July 1st, 1873, and did not recover on those falling due January 1st, 1874. (See de-

cision of the Judge, page 63, and the judgment, page 64.) In that case he recovered on the ground that it was proved in that case that he occupied the position of a *bona fide* holder for value parted with as to the coupons of July 1st, 1873, recovered upon. (Opinion in former suit, page 86, &c. Reported in 13 *Blatchford*, 424.)

In the Bailey suit, tried and decided at the same time, to recover upon 75 coupons falling due July 1st, 1872, the same Judge decided against the plaintiff on the ground that it did not appear that he was a *bona fide* holder for value parted with. (See record, page 80, folio 192; Opinion, record, page 85; and 13 *Blatchford*, 424.)

II. The suits now before the Court are upon different and distinct negotiable coupons from those recovered upon in the former suits, viz., those maturing January 1st, 1874, in suit No. 2, and July 1st, 1872, January 1st, 1873, July 1st, 1874, January 1st, 1875, July 1st, 1875, January 1st, 1876, and July 1st, 1876, in suit numbered three in the record. (See statement, *supra*, for references to record.)

In the case at bar there is no testimony as to when or how the plaintiff acquired these coupons. None that he parted with any value for them. The coupons were all detached from the bonds when produced on the trial. (Page 55, near top.) And it also appeared that the coupons maturing July 1st, 1872, were in possession of Bailey, and a suit brought upon them by him in July, 1872. (Page 80, folio 192.)

There was no evidence to authorize a finding that the plaintiff acquired the bonds or coupons from or through Elliott, Collins & Co. (See Point Fifth, sub II, *supra*, and references to testimony.)

This firm were the bankers of the railroad company, and it is quite probable that the railroad company paid up the loan to their bankers, and relieved the bonds from the pledge to them

therefor. Certain it is that there is no evidence that the bonds or coupons were ever sold or transferred by Elliott, Collins & Co. to the plaintiff, or any one else. (See sub II of Fifth Point, *supra.*)

The fact that the plaintiff established that he was a *bona fide* holder of the coupons maturing July 1st, 1873, and parted with value for them, and recovered upon them on this ground in the former suit, is no evidence that he is a *bona fide* holder for value parted with of the coupons sought to be recovered upon in this suit.

III. It is, therefore, respectfully insisted and submitted to the Court that the former suit and recovery therein do not estop or conclude the defendant in the case now before the Court.

Cromwell v. County of Sac, 94 *U. S. R.*, 351.
Davis v. Brown, 94 *U. S. R.*, 423.
Russell v. Place, 94 *U. S. R.*, 606.

Eighth. The Court below committed no material error in admitting evidence.

1. The evidence as to the suit by Bailey on the coupons maturing July 1st, 1872, was competent. The plaintiff produced and sought to recover on the same coupons in this suit. As bearing upon the question, whether the plaintiff was a *bona fide* holder for value parted with of these coupons, the defendant clearly had a right to prove they were held by Bailey in 1872, and that he then sought to recover upon them, and failed. (Page 65; 79, 80.)

2. The record of the proceedings by certiorari was competent evidence. The defendant had a right to prove that the railroad company had actual notice of these proceedings and gave the commissioners a bond of indemnity to induce them to issue the bonds in disregard of the same.

3. The evidence that the bonds were not executed by the commissioners under seal was competent. The declaration alleged they were. (See same in No. 2, page 3; in No. 3, page 38.)

The answer denied this. (Answer, page 41, second plea or answer.)

4. What was said between Clarke, the commissioner, and Delafield, the treasurer of the railroad company, in reference to the pending certiorari, was competent. (Page 80; page 77, folio 183.)

Ninth. The judgment below should be affirmed, with costs.

FRANCIS KERNAN,
Of Counsel for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 184.

JOHN J. STEWART, PLAINTIFF IN ERROR,

vs.

THE TOWN OF LANSING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED APRIL 23, 1879.

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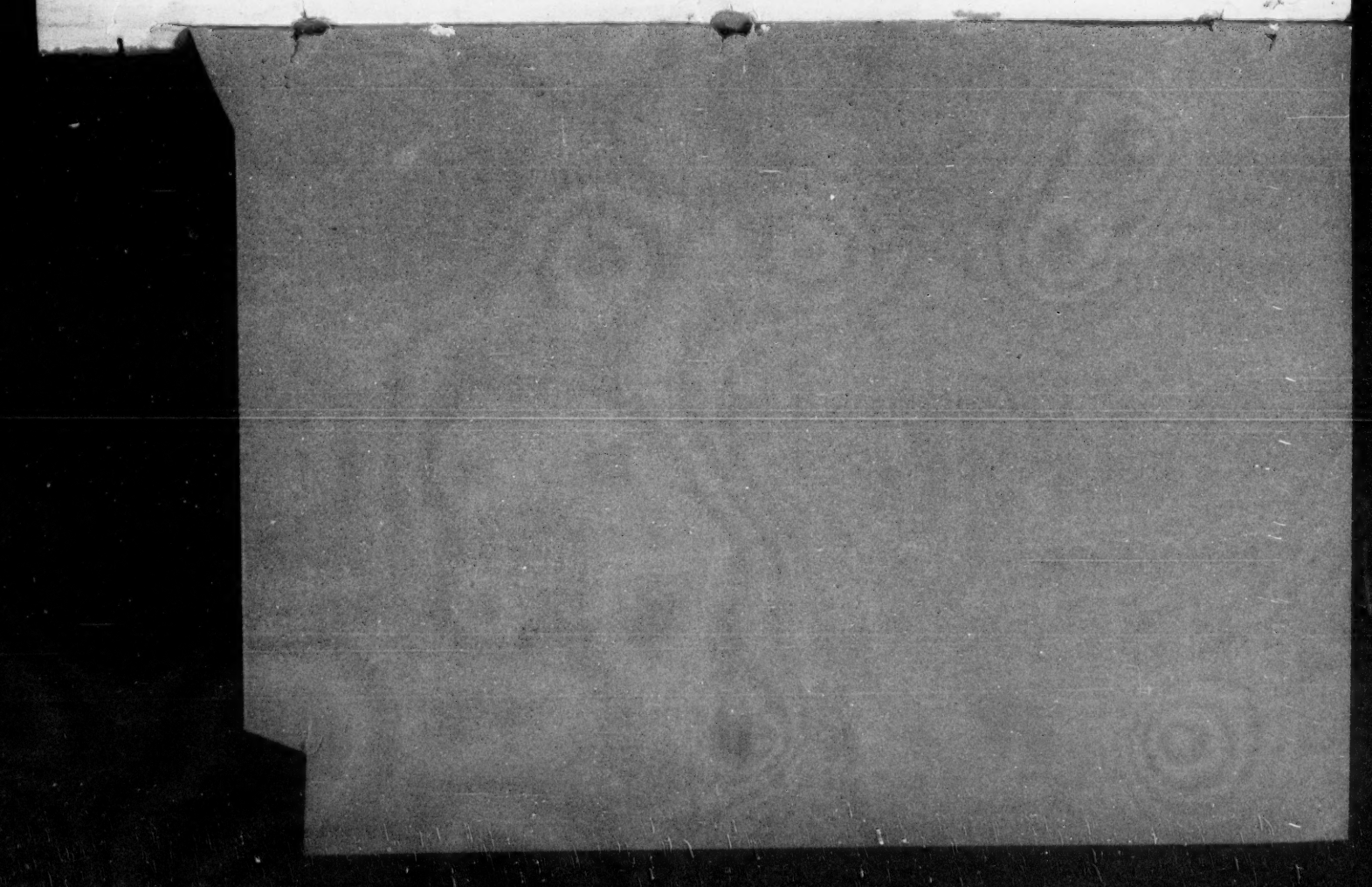
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in number and amounts with the several payments of interest to become due thereon; and that the said commissioners should subscribe, in the name of their said town, to the stock or the bonds of the said railroad corporation so named in the said petition, to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the said bonds therefor at par; and that such municipal bonds so issued pursuant to the provisions of said act should be a charge upon the real and personal property within the limits of said municipal corporation, the principal and interest thereof when due to be collected and paid in like manner as other debts, obligations, and charges against the said municipal corporation.

And the plaintiff further says that, in pursuance of the said act, on or about the 10th day of December, 1870, certain petitions of the tax-paying inhabitants of the said town of Lansing were duly presented to the honorable Mills Van Volkenburg, who was at that time the county judge of the said county of Tompkins, duly verified by the oath of one of the said petitioners, setting forth that such petitioners were such a majority of tax-payers, representing such a majority of the taxable property of the said town of Lansing as aforesaid, duly setting forth the desire of the said petitioners, according to the said act, that the said town of Lansing should create and issue its bonds to the amount of seventy-five thousand dollars, and to invest the same, or the proceeds thereof, in the stock of the Cayuga Lake Railroad Company, which company was at that time a railroad corporation formed and acting under the general railroad acts of the State of New York, and projecting its railroad through the said town of Lansing, by which petitions it was duly claimed that the said petitioners were a majority of the taxable inhabitants of said town, and representing the required majority of the property of said town, according to the requirements of said act.

And thereupon the said county judge duly took cognizance of the said matter, and duly made his order, as authorised by said act, requiring public notice to be given, by advertisement in a newspaper published in said county, to the effect that on the 24th day of December, 1870, at his office in Ithaca, at 10 o'clock in the forenoon, he, the said county judge, would proceed to take proofs of the allegations of said petition and the facts therein set forth, according to said act, which notice was duly published, as required by said act, in the Ithaca Journal, a newspaper published weekly in the said city of Ithica.

And thereupon, afterwards, and at the time and place so appointed, the said county judge did proceed to take the proofs as required by said act, and upon such taking being duly held and concluded, he, the said county judge, did adjudge and judicially determine, under and according to the said act, that the said petitioners whose names appeared upon said petition duly executed & signed the same, that they were tax-payers of the said town, as appeared by the last preceding tax-list of said town of Lansing, and that they, the said petitioners, constituted and represented a majority of the tax-payers of said town, and owned and represented a majority of the taxable property of the said town assessed and appearing upon the said last preceding tax-list or assessment-roll of said town; that the sum of $75,000 mentioned in said petition was less than 20 per cent. of the whole taxable property of the said town; and that all the requirements of the law respecting the creation and issuing of the bonds of said town to the amount of $75,000, and for the investment of the same in the stock

of the said the Cayuga Lake Railroad Company, had been fully complied with by said petitioners.

And thereupon the said county judge did duly make up a record of judgment to the effect aforesaid, and did duly file the same and cause the same to be duly recorded in the office of the clerk of said county, on the 21st day of March, 1871, according to the said act, and the same still remains of record; and by which judgment and order the said county judge did then and there duly appoint three freeholders of the said town of Lansing commissioners under the said act, that is to say, one Darius Hall, one John T. Knettles, and one Alonzo H. Clark, who were thereby authorized and required, with all convenient des-
9 patch, to make and execute the bonds of the said town of Lansing, under the said act, and likewise to do, execute, and perform all other the duties as such commissioners devolving upon them under the provisions of the said act aforesaid.

And thereupon, afterwards, the said commissioners, Hall, Knettles, and Clark, did duly qualify to the said office, and enter upon the discharge of the duties of the same, and did duly subscribe, in the name of the said town of Lansing, for 750 shares of the capital stock of the said the Cayuga Lake Railroad Company, on or about the 19th day of September, 1871; and afterwards, and in further performance of their duty, and according to the said order and judgment of the said county judge, they did create and issue, sealed with their seals, signed with their names, and certified by said commissioners, the bonds of the said town of Lansing to the amount in all of seventy-five thousand dollars, being seventy-five bonds of $1,000 each of principal,
10 payable in 30 years from date, and bearing interest, payable semi-annually, on the first day of January and July in each year, with coupons or interest warrants attached to each bond, in usual form, representing severally each semi-annual obligation of interest to accrue by the terms of said bonds, as such interest should thereafter become due and payable, copies of which are hereinafter fully set forth.

And thereupon, on or about the 19th day of September, 1871, they, the said commissioners, duly received from the said railroad company the 750 shares of its capital stock for which they had subscribed as aforesaid, and duly paid for the same, as authorised by said act, by exchanging the said bonds and coupons for said stock, at par, to the amount aforesaid of $75,000.

And then and there, in virtue of the said act, the said town of Lansing, in its corporate capacity, became and was, and still remains,
11 a stockholder of the said company to the amount of 750 shares thereof, of $100 each, in all to the amount of said bonds, that is to say, of $75,000.

And the said railroad company duly accepted the said bonds and coupons in payment for the said 750 shares of stock, at par, and duly issued to the said commissioners, for the use and benefit of the said town of Lansing, the usual stock-certificates showing that the said town of Lansing was such stockholder as aforesaid; which stock has ever since that time been, and still is, owned and held by the said town of Lansing, by its said officers, the said commissioners, up to this time.

And afterwards the said railroad company, in the usual course of its business, negotiated, assigned, and sold, for value paid, the whole of the said bonds and coupons, and the same were duly transferred and became the property of divers persons, and finally of this plaintiff, who now owns and holds a large number of the same; and in
12 particular this plaintiff owns and holds the coupons or interest

warrants of said bonds hereinafter stated and set forth, as follows, that is to say:

13 The said plaintiff, for a 1st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 1.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 2d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 2.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 3d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 3.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

14 The said plaintiff, for a 4th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 4.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 5th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 5.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth

National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 6th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 6.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

15 The said plaintiff, for a 7th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 7.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for an 8th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 8.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 9th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 9.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

16 The said plaintiff, for a 10th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof,

at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 10.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a' 11th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 11.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 12th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 12.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

17 The said plaintiff, for a 13th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 13.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 14th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 14.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 15th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one

of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 15.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

18 The said plaintiff, for a 16th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 16.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 17th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 17.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a' 18th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 18.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

19 The said plaintiff, for a 19th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No 19.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 20th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 20.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 21st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 21.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

20 The said plaintiff, for a 22d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof,

at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 22.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 23d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 23.

(Signed) DARIUS HALL,
Commissioner.

The said instrument in writing was duly presented to the said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

The said plaintiff, for a 24th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing, commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 24.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of January, 1874.

21 The said plaintiff, for a 25th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 25.

(Signed) DARIUS HALL,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said

22,23 coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 26th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 26.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 27th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with

one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 27.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 28th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 28.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

24 The said plaintiff, for a 29th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 29.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 30th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 30.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 31st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars for six months' interest then due on bond No. 31.

(Signed) JOHN C. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

25 The said plaintiff, for a 32d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 32.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 33d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 33.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 34th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof,

at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 34.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

26 The said plaintiff, for a 35th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 35.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 36th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 36.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 37th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 37.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

27 The said plaintiff, for a 38th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 38.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 39th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of

the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 39.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendent, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 40th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 40.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

28 The said plaintiff, for a 41st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 41.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 42d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 42.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 43d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 43.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

29 The said plaintiff, for a 44th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 44.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 45th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 45.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 46th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof,

at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 46.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

30 The said plaintiff, for a 47th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 47.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 48th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 48.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 49th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 49.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

31 The said plaintiff, for a 50th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 50.

(Signed) JOHN T. KNETTLES,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

32 The said plaintiff, for a 51st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in

connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 51.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

33 The said plaintiff, for a 52d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 52.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 53d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 53.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 54th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 54.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

34 The said plaintiff, for a 55th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 55.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 56th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 56.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 57th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 57.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

35 The said plaintiff, for a 58th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof,

at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 58.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 59th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 59.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 60th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 60.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same

by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

36 The said plaintiff, for a 61st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 61.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 62d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 62.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 63d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being

a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 63.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

37 The said plaintiff, for a 64th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tomkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 64.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 65th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York,

on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 65.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 66th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 66.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and the payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

38 The said plaintiff, for a 67th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 67.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 68th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 68.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 69th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 69.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

39 The said plaintiff, for a 70th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in

connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 70.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 71st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 71.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 72d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 72.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

40 The said plaintiff, for a 73d cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 73.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 74th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the first day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 74.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

The said plaintiff, for a 75th cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The Town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of January, 1874, the sum of thirty-five dollars, for six months' interest then due on bond No. 75.

(Signed) ALONZO H. CLARK,
Commissioner.

That said instrument in writing was duly presented to said Fourth National Bank, in the city of New York, for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the first day of January, 1874.

41 Whereupon the said plaintiff demands the judgment of this honorable court against the said defendant for each and every of the said causes of action; that is to say, in the aggregate for the sum of ($2,625) two thousand, six hundred and twenty-five dollars, with interest from the 1st day of January, 1874, besides the costs of this action.

JAS. R. COX,
Of Auburn, N. Y., Pl'ff's Att'y.

42 (Endorsed:) U. S. circuit court, north. dist. of N. Y. John J. Stewart ag't The Town of Lansing. Declaration Jas. R. Cox, of Auburn, N. Y., pl'ff's att'y. To file & enter rule to plead. Filed Sept. 11, 1875.

43 United States circuit court, northern district of New York.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. } Sept. 11, 1875.

On filing declaration in this case, and on motion of James R. Cox, plaintiff's attorney, ordered that the defendant herein appear and plead thereto within twenty days after service on it of a copy thereof and notice of the entry of this rule or judgment, &c.

44,45 *Declaration.*

Pleas in the United States circuit court for the northern district of New York, of June term, 1876; that is to say, of the 1st day of August, A. D. 1876.

JOHN J. STEWART
vs.
THE TOWN OF LANSING, IN THE COUNTY OF Tompkins.

John J. Stewart, a citizen of the State of Louisiana, plaintiff in this action, by James R. Cox, of Auburn, in said district, his attorney, complains of the said Town of Lansing, a municipal corporation in the county of Tompkins, in said district, defendant, by declaration filed in this cause, and not by writ, of a plea of trespass on the case, as follows:

For that whereas heretofore, by a certain act of the legislature of the said State of New York entitled "An act to amend an act entitled 'An act to authorize the formation of railroad corporations, and to
46 regulate the same,' passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869, it was, in substance, enacted that a majority of the tax-payers of any such municipal corporation, owning or representing a majority of the taxable property of said town, might present their petition to the county judge of their county, setting forth the facts as provided by said act, expressing their desire to aid in the construction of such railroad as is named in said petition; and that thereupon the said county judge shall order a notice to be forthwith published in a newspaper published in such county, directed to whom it may concern, setting forth that upon a day therein named he will proceed to take proofs of the facts set forth in said petition. And it was further provided that if at such time and place, upon taking such proofs,
47 it shall appear satisfactorily to him that such petitioners constitute a majority, representing a majority of the taxable property, as aforesaid, that then the said county judge shall so adjudge and determine, and shall cause the same to be entered of record in the clerk's office of said county, such judgment and the record thereof to have the same force and effect as other judgments and records in courts of record in said State.

And it was further thereby enacted that in case of such determination and adjudication the said county judge should forthwith appoint and commission three freeholders of such town to be commissioners for the purposes of subscribing for the stock of such railroad, and of issuing the bonds of said town in payment therefor, and to discharge such other duties as are provided by said act.

But such bonds were not to be issued to an amount beyond 20
48 per cent. of the assessed valuation of such taxable property, as shown by the last preceding assessment-roll; and were to be issued by such commissioners, sealed with their seals, payable at the expiration of 30 years, with interest at seven per cent. per annum, payable semi-annually, and not to exceed in the aggregate the amount set forth in said petitions.

Such bonds were to bear interest warrants (or coupons) corresponding with the several payments of interest to become due thereon.

And it was further thereby enacted that the said commissioners should subscribe, in the name of their said town, to the stock or the

bonds of the said railroad corporation so named in the said petition to an amount equal to the amount of the bonds so created by them, and to pay for the same by exchanging the said bonds therefor at
49 par; and that such municipal bonds so issued, pursuant to the provisions of the said act, should be a charge upon the real and personal property within the limits of the said town, the principal and interest thereof, when due, to be collected and paid in like manner as other debts, obligations, and charges against the said town.

And the plaintiff further says that, in pursuance of the said act, on or about the 10th day of December, 1870, certain petitions of the tax-paying inhabitants of the said Town of Lansing were duly presented to Mills Van Volkenbergh, esq'r, who was at that time the county judge of the said county of Tompkins, duly verified by the oath of one of them, setting forth that such petitioners were such a majority of the tax-payers, and representing such a majority of the taxable property of
50 said Town of Lansing, as aforesaid required by said statute; also duly setting forth the desire of the said petitioners, according to the said act, that the said Town of Lansing should create & issue its bonds to the amount of seventy-five thousand dollars ($75,000), and to invest the same in the stock of the Cayuga Lake Railroad Company, which company was at that time a railroad corporation formed and acting under the general railroad laws of the said State, which tax-payers so petitioning claimed to be a majority of the taxable inhabitants of said town, and to represent a majority of the real and personal property, as prescribed by said act.

And thereupon the said county judge duly took cognizance of the said matter, and duly made his order according to said act, requiring public notice to be given, by advertisement in a newspaper published in said county, to the effect that on the 24th day of December,
51 1870, at his office in Ithaca, at 10 o'clock a. m., he would proceed to take proofs of the allegations in said petition, and of the facts therein set forth, under and according to the said act aforesaid, which notice & order were duly published, as required by said act, in the Ithaca Journal, a newspaper published weekly in said county.

And thereupon, at the time and place appointed as aforesaid, the said county judge did proceed to take the proofs as required by said act, and upon such taking, the same being duly held and concluded, he, the said county judge, did find, judicially determine, and adjudge, under and in pursuance of said act, that the said petitioners whose names appeared upon said petitions duly executed and signed the same, that they were tax-payers of the said town whose names appeared by the last
52 preceding tax-list or assessment-roll of said Town of Lansing, and that they, the said petitioners, constituted and represented a majority of the tax-payers and property of said town appearing on the last preceding tax-list or assessment-roll of said town, as provided by the said act; that the said sum of $75,000 mentioned in said petition was less than twenty per cent. of the whole taxable property of the said town appearing on said roll; and that all the requirements of law respecting the creation and issuing of the bonds of said town to the said amount of $75,000, and for the investment of the same in the stock or bonds of the said the Cayuga Lake Railroad Company, had been fully complied with by the said petitioners, according to the provisions of the said act aforesaid.

And thereupon the said county judge did duly make a record of
53 judgment to the effect aforesaid, and duly filed the same and caused the same to be duly recorded in the office of the clerk of

said county, on the 21st day of March, 1871, according to the said act, and the same still remains of record.

And the said county judge did also then and there duly appoint three freeholders, who were residents and taxpayers of said Town of Lansing, commissioners under the said act, that is to say, one Darius Hall and John T. Knettles and one Alonzo H. Clark, who were thereby authorized and required, with all convenient dispatch, to make and execute the bonds of the said Town of Lansing, under the said act, and also to do and perform all the other duties appertaining to said office.

And thereupon, afterwards, the said commissioners, Hall, Knettles, and Clark, did duly qualify to said office, and enter upon the discharge of the duties of the same, subscribing, in the name of the
54 said Town of Lansing, for 750 shares of the capital stock of the said railroad company, on or about the 19th day of September, 1871, and did thereupon create and issue, sealed with their seals, and signed with their names as such commissioners, seventy-five bonds of the said Town of Lansing, each bond being for $1,000 and interest, to the amount in all of $75,000. Said bonds were duly numbered from No. 1 to No. 75, inclusive, and were all alike, and in the same words and figures, with interest warrants or coupons attached to each bond for each payment of semi-annual interest, as set forth and covenanted by the bonds respectively. A true copy of said bonds is in the words and figures following, that is to say:

No. 1.] UNITED STATES OF AMERICA. [$1,000.

STATE OF NEW YORK,
Town of Lansing, County of Tompkins:

Issued by virtue of an act of the legislature of the State of
55 New York entitled "An act to amend an act entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,' passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869.

This act authorizes the Town of Lansing, in the county of Tompkins, to subscribe to the stock of the Cayuga Lake Railroad Co., and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said act is $75,000.

Know all men by these presents that we, the undersigned commissioners under the above-entitled acts, for the Town of Lansing, in the county of Tompkins and State of New York, upon the faith and credit and in behalf of said town, for value received, promise to pay to the bearer the sum of one thousand dollars, on the first day of Janu-
56 ary, in the year one thousand nine hundred and two (1902), at the Fourth National Bank of New York, in the city of New York, with interest at seven per cent. per annum from and after the first day of January, in the year 1872, payable semi-annually, on the first days of July and January in each year, at the same place, on the presentation and surrender of the coupons for such interest hereto annexed.

In witness whereof we have hereunto set our hands and seals, and have caused the coupons hereto annexed to be signed by one of our number, this first day of October, in the year one thousand eight hundred and seventy-one.

SEAL OF THE COUNTY OF TOMPKINS.

DARIUS HALL, [L. S.]
ALONZO H. CLARK, [L. S.]
JOHN T. KNETTLES, [L. S.]
Commissioners.

Registered in the county clerk's office of Tompkins County.
57 (Following the above & attached to each of said bonds were the usual interest warrants or coupons for semi-annual interest, on the first day of July and January in each year from July, 1872, to the maturity of principal of the said bond, each of which said coupons was for the payment of the sum of $35.)

And thereupon, on or about the 19th day of September, 1871, they, the said commissioners, duly paid to the said the Cayuga Lake Railroad Company, for the said 750 shares of stock so subscribed for as aforesaid, by exchanging the said seventy-five bonds, with the coupons aforesaid, for the said stock, at par; and the said railroad company duly received and accepted the said 75 bonds & coupons in payment for said 750 shares of stock, at par, and duly issued to the said commissioners, for the benefit of the said Town of Lansing, defendant, the usual
58 certificates or scrips representing said 750 shares of the said railroad company's capital stock, and the said commissioners, as authorized by the said act, duly received the same in behalf of the said Town of Lansing, defendant, and have ever since that time held & owned the same; and then & there the said Town of Lansing, in pursuance of said act, and of the reception and holding of said stock, became and was, and still remains, a stockholder of the said railroad company to the amount and effect of the said 750 shares of stock.

And afterwards the said railroad company, in the usual course of its business, negotiated and sold, and transferred for value received, the whole of the said bonds, with the said coupons, and used the money thence derived in the construction and equipment of the said railroad; and afterwards the same duly came to the ownership and possession of this plaintiff, who now holds and owns the same, with the
59 coupons representing the unpaid interest, as hereinafter set forth.

And the plaintiff further says that as the said payments of interest fell due from the said 1st day of July, 1872, semi-annually, up to the present time, the said defendant failed to make any provisions for the payment thereof at the said 4th National Bank in New York, or anywhere else, and the same remain wholly unpaid.

And thereafter, and about the 8th day of April, 1874, this plaintiff, by his action in this court, duly impleaded the said defendant in an action to recover the interest which fell due on said bonds and coupons on the 1st day of July, 1873, & the defendant duly appeared in said action and set up its defences; and such proceedings were thereupon had that afterwards, and on the 11th day of July, 1876, the said plaintiff, by the judgment of this court, duly recovered judgment for the amount of the said unpaid interest on said bonds and coupons which became due & payable on the said 1st day of July, 1873, that is to say, for $2,625, for which, with interest and costs, judgment was duly rendered
60 and docketed in this court in favor of the said plaintiff, and against the said defendants, for the sum of $3,176.25 damages & debt, and $110.95 costs, which judgment still remains of record in the office of the clerk of this court as aforesaid.

I. And for the first cause of action in this cause the plaintiff says that there is due to him and unpaid from the said defendants, by reason of the said bonds and coupons, the interest on the said bonds which became due and payable on the 1st day of July, A. D. 1872, that is to say, $2,625, and interest from that date to the present time, no part of which has been paid.

II. And for the second cause of action this plaintiff further says that there is due to him and unpaid from the said defendants, by reason

of the said bonds and coupons, the further sum of $2,625, and interest, which became due and payable on the 1st day of January, 1873, no part of which has been paid.

61 III. And for a third cause of action the said plaintiff says that there is due to him and unpaid from the said defendants, by reason of the said bonds and coupons, the further sum of $2,625, and interest, which became due and payable on the 1st day of July, 1874, no part of which has ever been paid.

IV. And for a fourth cause of action the plaintiff says that there is due to him and unpaid from the said defendants, by reason of the said bonds and coupons, the further sum of $2,625, and interest, which became due and payable on the 1st day of January, 1875, no part of which has ever been paid.

V. And for a fifth cause of action the plaintiff says that there is due to him & unpaid from the said defendants, by reason of the said bonds and coupons, the further sum of $2,625, and interest, which became due and payable on the 1st day of July, 1875, no part of which has ever been paid.

62 VI. And for a sixth cause of action the plaintiff says that there is due to him from the said defendants, by reason of the said bonds and coupons, the further sum of $2,625, and interest, which became due and payable on the 1st of January, 1876, no part of which has ever been paid.

VII. And for a seventh cause of action the plaintiff says that there is due to him from the said defendants, by reason of the said bonds and coupons, the further sum of $2,625, and interest, which became due and payable on the 1st day of July, 1876, no part of which has ever been paid.

And plaintiff brings here into court, and hereby offers to surrender the same all the coupons or interest warrants above mentioned, representing the mature & unpaid interest, for which this action is brought, ready to be disposed of as this honorable court shall direct.

Wherefore this plaintiff respectfully asks the judgment of this honorable court in his favor, and against the said defendant, the Town of Lansing, for the said several sums of money and interest, to the

63 amount of eighteen thousand three hundred & seventy-five dollars of debt due, together with the interest thereon up to the date of rendering judgment, and also the costs and disbursements of this action.

JAS. R. COX,
Of Auburn, N. Y., Plaintiff's Att'y.

(Endorsed:) U. S. circuit court, north. dist. of N. Y. John J. Stewart vs. the Town of Lansing. Action No. 3. Copy declaration. Jas. R. Cox, Auburn, N. Y. Filed Aug. 19, 1876.

64 United States circuit court, northern district of New York.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. } Action 3d. Aug. 19, 1876.

On filing declaration or complaint in this case, and on motion of James R. Cox, plaintiff's attorney, ordered that the defendant herein appear and plead thereto, within twenty days after service of a copy thereof and notice of the entry of this rule, or judgment, &c.

65 Circuit court of the United States for northern district of New York, of the June term, 1875, that is to say, of the twentieth day of September, 1875.

JOHN J. STEWART
vs.
THE TOWN OF LANSING.

The Town of Lansing, the abov-enamed defendant, by Milo Goodrich, its attorney, comes & defends the wrongs & injuries, when, &c., and says that the said defendant did not undertake and promise in manner & form as the plaintiff in his said complaint or declaration herein hath above thereof complained against the defendant and of this the said defendant puts itself upon the country, &c.

Second. And for further plea and answer to the said complaint or declaration, and to the several counts therein, the defendant denies each and every allegation therein contained.

Third. And for further plea and answer to the said complaint or declaration herein the defendant alleges that immediately upon the alleged making of the decision of the said Mills Van Valkenburgh,
66 county judge, as set forth in the said complaint or declaration herein, and immediately upon the entry and docketing of the said alleged judgment that is mentioned & set forth in said complaint or declaration, to wit, on or about the 27th day of March, 1871, upon due application made by Roswell, Beardsley, and others, resident freeholders and tax-payers of the said Town of Lansing, who had appeared in the said proceedings before the said county judge set forth in said complaint or declaration, and duly traversed and contested the same, a writ of certiorari in due form of law was duly allowed and issued by and out of the supreme court of the State of New York, directed to the said county judge, for the review and determination by the said supreme court touching the validity or invalidity of the before-mentioned proceedings and decision and judgment before him, the said county judge; that the said writ was thereupon duly served on the
67 said county judge, whose return in obedience thereto, dated on or about September 1st, 1871, was duly filed in the office of the clerk of the said supreme court, in said Tompkins County, on or about the 8th day of January, 1872, where, by such proceedings and judgment before the said county judge, were duly removed into and before the said supreme court and the justices thereof, in the sixth judicial district, in the said State of New York, for review and determination as aforesaid, according to the rules and practice of said court; that thereupon, in the said supreme court, before the justices, and at a general term thereof, held at the city of Albany, in the said State, on the first Tuesday of March, 1872, the parties relators and respondents having duly appeared and respectively duly presented, argued, and submitted to the said court what they severally had to present touching the matters involved and presented in and by the said return, and in reference to the validity or invalidity of the said proceedings and judgment before the said county judge; and that afterwards, to wit, at a general
68 term of the said supreme court, held at the city of Elmira, in the State aforesaid, on the first Tuesday of May, 1872, the said court, after having fully considered the matters so presented, argued, and submitted as aforesaid, did then and there duly decide, determine, order, and adjudge, among other things, that the said proceedings and judgment before the said county judge were wholly unauthorized and

invalid, and that the same be, and in and by the said order and judgment of the said court then and there duly made and entered the same were, in all things reversed.

That pursuant to such order and determination of said court, and on or about the 27th day of May, 1872, judgment in and by the said supreme court was duly perfected and entered, and the judgment roll thereof duly filed, and such judgment duly docketed in the office of the clerk of said court, to wit, in the office of the clerk of said Tompkins County, whereby the said proceedings and judgment before the said county judge mentioned and set forth in the aforesaid complaint or declaration in this action, were and are in all things reversed, annulled, set aside, and held for nought, as appears by the said judgment and the
69 record thereof remaining unimpaired and unreversed in the clerk's office aforesaid. And that of the issuing of the said writ of certiorari, and the proceedings thereon aforesaid, the said alleged commissioners, and the said alleged railroad company, and the officers thereof, mentioned or referred to in said complaint or declaration, all had notice before the said pretended making and issuing of the said bonds and coupons, and the said disposition thereof to such railroad company, which is mentioned and set forth in said complaint or declaration.

Fourth. For a fourth plea or answer to the said several causes of action set forth in said complaint or declaration, the defendant alleges that the said petition therein mentioned to have been presented to the said county judge did not embrace and did not purport to embrace the names of a majority of the tax-payers representing a majority of the taxable property of the said town of Lansing (named as the defendant in this action), appearing on the then last preceding tax-list or assessment thereof; that said petition, at the time when so presented to the said county judge, did not embrace or purport to embrace, and was not so presented, nor did the same purport to be presented, to said
70 county judge by a majority of the tax-payers whose names appeared on the tax-list or assessment aforesaid, as representing a majority of the taxable property of said town; that no verification or proof that such petition did embrace such majority of said tax-payers was made in said proceedings before the said county judge; that at the times when the said petition was so presented and when said proceedings were so had to and before said county judge, and when the said decision and judgment thereon were by him so made and entered, as set forth in said complaint or declaration, the said railroad company was not, nor at either of those times was it, a duly organized railroad company or corporation, but the same had then no legal or valid existence whatever; and that, by virtue of the said petition and the proceedings thereon had before the said county judge, he, the said county judge, acquired no authority or jurisdiction to make the decision and judgment so by him made, or to appoint the said commissioners so by him appointed as aforesaid. And further, the defendant alleges that the several matters and facts herein above set forth were alleged and made the ground upon which, among others, the said
71 writ of certiorari was applied for and issued; of all which full notice was had by the said alleged commissioners, and also by the said alleged railroad company and its officers and agents at and before the time when such commissioners made and issued said alleged bonds and coupons, and when they made disposition thereof to such railroad company, as claimed and set forth in said complaint or declaration.

Fifth. And for a fifth plea or answer to the several causes of action set forth in said complaint or declaration, the defendant further alleges

that the said bonds and coupons were by the said alleged commissioners made, issued, and disposed of as aforesaid, wholly without right or authority as agents or commissioners of the said town of Lansing, and that by reason of the premises the said alleged railroad company never acquired any valid title thereto or any right whatever to enforce the same against said town, or the officers or tax-papers thereof; that the plaintiff derives his pretended title to said coupons or said bonds and coupons upon which this action is brought from said railroad company; that such title was so acquired by the plaintiff without his paying or parting with any valuable consideration therefor, long after the
72 rendition, entry, and docketing of the said judgment, which was so given and rendered by the said supreme court as aforesaid, and with full notice thereof, and of the invalidity of such bonds & coupons.

Wherefore the defendant demands judgment that the plaintiff's said complaint or declaration be dismissed with costs.

M. GOODRICH,
Def't's Att'y.

73,74 (Endorsed:) United States cir. court. John J. Stewart vs. The Town of Lansing. Def't's plea or answer. M. Goodrich, def't's att'y, Auburn, N. Y. Filed July 12, 1876.

75 U. S. circuit court for northern dist. N. Y.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. } Action No. 2 & 3.

Since the commencement of this first action, another having been brought upon coupons falling due, it is hereby stipulated between the parties that all past-due coupons may be brought in upon the trial of this action and added to the amount of those for and upon which this action was prosecuted, to share under the pleadings herein the same decision and subject to all the same defences which are set up in the answers or plea in this action.

Dated Oct. 6th, 1876.

JAS. R. COX,
Pl'ff's Att'y.
M. GOODRICH,
Def't's Att'y.

76 (Endorsed:) Stewart vs. Lansing. Stipulation to consolidate the 2 pending actions, including all coupons due up to and including July 1, 1876. Filed June 21, 1871.

77 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the village of Canandaigua on the 20th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Hoyt H. Wheeler, judge.

James R. Cox.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. }

Milo Goodrich & H. L. Comstock.

On motion of James R. Cox, plaintiff's attorney, ordered that a jury be empanelled and that the trial of this cause do now proceed.

Whereupon the following-named jurors were called and sworn:

Fredrick A. Sackett.	James C. Debon.
Edward E. Baker.	William W. Miner.
John B. Armitage.	Noah J. Parmele.
Stephen Johnson.	George Noble.
John D. Trickey.	Homer Chase.
Oscar G. Cummings.	Jay Carser.

78 Mr. Cox opens case for plaintiff.
Plaintiff's witnesses: Alonzo H. Clark, James R. Cox.
Mr. Comstock opens case for defendant.
Defendant's witnesses: Orange P. Hyde, Doctor Tarbell, Darius Hall, Alonzo G. Clark, Anson W. Nettles.
Court adjourned until 10 o'clock a. m. to-morrow.

THURSDAY, *June* 21, 1877—10 o'clock a. m.

Court met. Present, Judge Wheeler.

* * * * * * *

JOHN J. STEWART *vs.* THE TOWN OF LANSING. } Jury called; 12 answer.

Trial continued.
Defendant's witness, Alonzo H. Clark, recalled.
Plaintiff's witness: Talmadge Delafield.
Mr. Cox sums up for plaintiff.
Mr. Comstock sums up for defendant.
79 Argument to be continued after recess.

* * * * * * *

Recess until 2 o'clock p. m.

2 o'clock p. m. court met. Present, Judge Wheeler.

JOHN J. STEWART *vs.* THE TOWN OF LANSING. } Jury called; 12 answer.

Mr. Comstock continues argument for defendant.
Court adjourned until 10 o'clock a. m. to-morrow.

FRIDAY, *June* 22, 1877—10 o'clock a. m.

Court met. Present, Judge Wheeler.

* * * * * * *

JOHN J. STEWART *vs.* THE TOWN OF LANSING. } Jury called; 12 answer.

Argument continued.
Recess until 2 o'clock p. m.
80 2 o'clock p. m. court met. Present, Judge Wheeler.

JOHN J. STEWART *vs.* THE TOWN OF LANSING. } Jury called; 12 answer.

Court directs verdict for defendant.

The jury here, under direction of the court, answer and say they find a verdict for the defendant.

Ordered that the plaintiff have 60 days in which to make and serve a case, with leave to turn the same into a bill of exceptions, and that in the mean time all other proceedings be stayed.

United States circuit court northern district of New York.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. } September 21st, 1878.

This cause having come on to be heard on the motion of the plaintiff for a new trial at chambers, before the honorable Hoyt H.
81 Wheeler, judge, and having been argued by counsel for the respective parties, after due consideration, it is ordered that said motion for a new trial be, and the same is hereby, overruled, and that judgment be entered on the verdict.

United States circuit court, northern district of New York.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. } Action No. 2.

THE SAME
vs.
THE SAME. } Action No. 3.

These two actions having been, pursuant to the order of this court and a stipulation in writing duly signed by the attorneys for these parties and filed with the court, consolidated together and tried as one case, at a term of said court held at the village of Canandaigua, commencing on the 19th day of June, A. D. 1877, before the Hon. Hoyt H. Wheeler, judge presiding, and a jury, and the said issues having then and there been tried, and a verdict having been duly rendered
82 by said jury, under the direction of the court, against the plaintiff and in favor of the defendant, and a motion for a new trial having been made by said plaintiff, and the same having been denied, and the costs of said defendant having been adjusted at the sum of $247.50; now, on motion of Milo Goodrich, esq'r, of counsel for the defendants, it is ordered and adjudged that the said complaints or declarations in each of said actions (No. 2 and 3 aforesaid) be, and they hereby are, dismissed upon the merits; and further ordered and adjudged that the defendants recover of the said plaintiff the said sum of two hundred and forty-seven dollars and fifty cents, costs *costs* herein, and the said plaintiff have execution therefor.

Judgment signed this 19th day of December, A. D. 1878.

CHARLES MASON, *Clerk.*

83,84 (Endorsed:) U. S. circuit court, north. dist. of N. Y. John J. Stewart vs. The Town of Lansing. 2d & 3d actions. Judgment record. Milo Goodrich, def't's att'y. Costs, $247.50. Filed December 19, 1878, 10 o'clock a. m.

85 *Case on motion by plaintiff for new trial.*

United States circuit court north'n dist. of New York.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. } No. 2.

SAME
vs.
THE SAME. } No. 3.

The first above-entitled action was commenced of the June term (Sept. 3), 1875, by declaration duly filed and served, of which the following is a copy:

[The declaration is omitted from this bill of exceptions by stipulation of the parties, because embodied in judgment record hereto prefixed. See Index.]

The defendant duly appeared and made plea or answer, of which the following is a copy:

[The answer is omitted from this bill of exceptions by stipulation, because embodied in judgment record hereto prefixed. See Index.]

86 Thereafter the other of the above-entitled actions was commenced by due filing & service of declaration, entitled of the June term (1st day of August), 1876, which declaration was as follows:

[The declaration is omitted from this bill of exceptions by stipulation of the parties, because embodied in judgment record hereto prefixed. See Index.]

87 (Here follows the usual "notice to plead.")

Thereupon, before the expiration of the time for defendant to plead or answer, upon due appearance, the following stipulation between the parties, by their respective attorneys, was duly made and filed, to wit:

United States circuit court northern district of N. Y.

JOHN J. STEWART
vs.
THE TOWN OF LANSING. } Actions Nos. 2 & 3.

Since the commencement of this (first) action, another having been brought upon coupons falling due, it is hereby stipulated between the parties that all past-due coupons may be brought in upon the trial of this action and added to the amount of those for and upon which this action is prosecuted, to share under the pleadings herein the same decision, and subject to all the same defences which are set up in the answer or plea in this action.

88 Dated Oct. 6th, 1876.

JAMES R. COX,
Pl'ff's Att'y.
M. GOODRICH,
Def't's Att'y.

Afterwards, at a circuit court held at Canandaigua, in said district, on the 20th day of June, 1877:

Present, Hon. H. H. Wheeler, dist. judge, and a jury. These two actions, under and pursuant to said stipulation, were tried as one action.

Mr. James R. Cox appeared for the plaintiff, and Mess's M. Goodrich and H. L. Comstock for the defendants.

Plaintiff's counsel offered in evidence an exemplified copy of the judgement of the county judge of Tompkins Co., N. Y., and of other papers thereto annexed, in the words and figures following, viz:

STATE OF NEW YORK,
Tompkins County, ss:

James A. Burr, of the town of Lansing, in the county of Tompkins, in the State of New York, being first duly sworn, doth depose and
89 say that he is a tax-payer, residing in said town of Lansing, in said county of Tompkins; that the name of this deponant appears upon the last preceeding tax-list or assessment roll of said town of Lansing as an owner of taxable property in the corporate limits of the said town of Lansing; that he is one of the petitioners to the petitions hereunto annexed; that he subscribed his name to said petition as one of said petitioners for the purposes therein set forth; that he has read the said petition hereto annexed and knows the contents thereof, and that the same is true of his own knowledge, and contains the names as petitioners therein of a majority of the tax-payers of said town of Lansing, whose names appear upon the last preceeding tax-list or assessment roll of said town of Lansing as owning or representing a majority of the taxable property in the corporate limits of said town of Lansing.

JAMES A. BURR.

Subscribed and sworn before me this 10th day of December, 1870.
CHARLES G. DAY,
Justice of the Peace.

(Indorsed:) Filed Dec. 10, 1870.

90 COUNTY OF TOMPKINS:

In the matter of the petition of James A. Burr and other tax-payers of the town of Lansing, Tompkins County, New York, setting forth that they are a majority of the tax-payers, and represent a majority of the taxable property of said town, and desire that said town of Lansing shall create and issue its bonds to the amount of $75,000.00, and invest the same, or the proceeds thereof, in the stock or bonds, or both, of the Cayuga Lake Railroad Company.

Before Hon. H. Van Valkenburgh, county judge of Tompkins County, at his office in Ithaca, in said county, on the 10th day of December, 1870.

On reading and filing the petition of James A. Burr and others, setting forth, among other things, that the said petitioners constitute a majority of the tax-payers of the town of Lansing, Tompkins County, N. Y., whose name appear upon the last preceeding tax-list or assessment roll of said town of Lansing as owning or representing a
91 majority of the taxable property in the corporate limits of said

town, and that said petitioners desire that said town of Lansing shall create and issue the bonds of said town to the amount of seventy-five thousand dollars, and invest the same, or the proceeds thereof, in the stock or bonds, or both, of the Cayuga Lake Railroad Company, and that such proceedings may be had as are prescribed by an act of the legislature of the State of New York entitled "An act to amend an act to authorize the formation of railroad corporations and to regulate the same, passed April 2nd, 1850," passed May 18th, 1869 (chap. 907 of laws of 1869), which said petition is duly verified by James A. Burr, one of said petitioners—

On motion of Marcus Lyon, esq., attorney for said peti'oners, it is ordered that a notice be forthwith published in The Ithaca Journal, a newspaper published in the village of Ithaca, in said county of Tompkins, directed "To whom it may concern," setting forth that on the 24th day of December, 1870, at 10 o'clock in the forenoon of that day, at the office of the county judge of Tompkins County, in the vil-
92 lage of Ithaca in said county, he, the said county judge, will proceed to take proof of the allegations in said petition and of the facts therein set forth as to the number of tax-payers joining in said petition, and as to the amount of taxable property represented by them, and of such other facts as may properly be inquired into under the provisions of the aforesaid act and amendments thereof, and under the provisions of law in such case made and provided.

WILLIAM M. VAN VALKENBURGH,
Tompkins County Judge.

Dated December 10th, 1870.

(Indorsed:) Tompkins County clerk's office, Ithaca, N. Y. Filed December 12th, 1870.

STATE OF NEW YORK,
Tompkins County, ss:

Wesley Hooker, being duly sworn, deposes and says that he resides in Ithaca, county and State aforesaid, and that he is the business manager of "The Ithaca Journal," a public newspaper printed
93 and published in Ithaca aforesaid, and that a notice of which the the annex' is a true copy was published in said newspaper in each week for two successive weeks, and that the first publication of said notice was on the 13th day of December, 1870.

WESLEY HOOKER.

Subscribed and sworn before me this 16th day of January, 1871.
M. VAN VALKENBURGH,
County Judge.

To whom it may concern:

A petition signed by James A. Burr and others and duly verified by one of the peti'oners having this day been presented to the undersigned, which said petition sets forth among other things that the said petitioners constitute a majority of the tax-payers of the town of Lansing, Tompkins County, New York, whose names appear upon the last preceding tax-list or assessment roll of said town of Lansing as owning or representing a majority of the taxable property in the corporate
94 limits of said town; that said petitioners desire that said town of Lansing shall create and issue the bonds of said town to the amount of seventy-five thousand dollars and invest said bonds or the

proceeds thereof in the stock or bonds, or both, of the Cayuaga Lake Railroad Company, a railroad corporation in the State of New York, and also desiring that such proceedings may be had as are prescribed by chapter 140 of the laws of the State of New York passed April 2nd, 1850, and entitled "An act to authorize the formation of railroad corporations and to regulate the same," and "An act passed May 18th, 1869, amending the same so as to permit municipal corporations to aid in the construction of railroads," and acts amendatory of the same.

Now, therefore, pursuant to an order this day duly made by the undersigned as county judge of Tompkins County, upon presentations of said petition, notice is hereby given that the undersigned as such county judge will, on the 24[redacted]y of December, 1870, at 10 o'clock in the
95 forenoon of that d[redacted]'s office in Ithaca in said county, proceed to take proof of the allegations in said petition and of the facts therein set forth as to the number of tax-payers joining in said petition and as to the amount of taxable property represented by them, and of such other facts as may properly be inquired into under the provisions of the aforesaid acts and the amendments thereof.

Dated December 10th, 1870.

M. VAN VALKENBURGH,
Tompkins County Judge.

COUNTY OF TOMPKINS:

In the matter of the petition of James A. Burr and others, tax-payers, of the town of Lansing, Tompkins County, New York, setting forth that they desire that said town of Lansing shall create and issue its bonds to the amount of seventy-five thousand dollars, and invest the same or the proceeds thereof in the stock or bonds, or both, of the Cayuga Lake Railroad Company, &c., before Hon. M. VanVal-
96 kenburgh, county judge of the county of Tompkins, at his office in the village of Ithaca in said county, this 2*th* day of March, in the year 1871.

The petition of James A. Burr and others, tax-payers of the town of Lansing, Tompkins County, New York, having been presented to me, the county judge of Tompkins County, on the 10th day of December, 1870, which petition sets forth and alleges, among other things, that the names of said petitioners appear upon the tax-list and assessment roll of said town of Lansing as owning or representing certain taxable property in the corporate limits of said town, and that said petitioners desire that said town of Lansing shall create and issue its bonds to the amount of seventy-five thousand dollars, and invest the same or the proceeds thereof in the stock or bonds, or both, of the Cayuga Lake Railroad Company; also, that such proceedings might be had as
97 are prescribed by an act of the legislature of the State of New York, entitled "An act to amend an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869 (chap. 907 of the laws of 1869), which said petition was duly verified.

And I, the said county judge, upon the presentation to me of said petition, duly verified, and upon motion of Marcus Lyon, esq., attorney for said petitioners, having made an order on said 10th day of December, 1870, that a notice be forthwith published in the "Ithaca Journal," a newspaper published in the village of Ithaca, in said county of Tomp-

kins, directed "to whom it may concern," setting forth that on the 24th day of December, 1870, at 10 o'clock in the forenoon of that day, at the office of the county judge of Tompkins County, in the village of Ithaca,
I, the said county judge, would proceed to take proof of the alle-
98 gations in said petition, and as to the number of tax-payers join-
ing in said petition, and as to the amount of taxable property represented by them, and of such other facts as might properly be inquired into under the provisions of the aforesaid act or acts. And I, the said county judge, at the time and place named in the said notice, to wit, on said 24th day of December, 1870, and at the office of said county judge in Ithaca, and on such other days subsequent to said 24th December, 1870, as the proceedings in this matter were from time to time adjourned, having taken due proof of the due publication of said notice as required by said order, as well by the examination upon oath before me of the business manager of the said "The Ithaca Journal," as by the affidavit of said publication as hereto annexed, and having upon the various days, from time to time, during the hearing of this matter taken due proof of the signing and execution of the said petition
by the petitioners whose names are signed thereto, and that said
99 petitioners are tax-payers of said town of Lansing, as shown by
the last preceeding tax-list or assessment-roll of said town; and that said petitioners do constitute and represent a majority of said tax-payers, as so shown upon said last preceeding tax-list or assessment-roll, and do represent a majority of the taxable property upon said last preceeding tax-list or assessment-roll, and having been attended by said James A. Burr and others, of said petitioners, with their counsel, and by Roswell Beardsley and others, tax-payers of said town of Lansing, with their counsel, in opposition to the prayer of said petitioners, and having proceeded to take full proof as to the allegations of said petition, and whether said petitioners are tax-payers of said town of Lansing whose names appear upon said last preceeding tax-list or assessment-roll of said town of Lansing, and whether they are a majority of said tax-payers, and whether they do represent a majority of the taxable property in the corperate limits of said town of Lansing, as
100 appears by the said last preceeding tax-list or assessment-roll,
and having examined into said proofs and allegations and duly deliberated thereon:

Now, on motion of Marcus Lyon, attorney for said petitioners, I, the said county judge of Tompkins County, do now adjudge and determine that said petition was duly signed and executed by the petitioners whose names appear upon the same as petitioners thereto; that said petitioners are tax-payers of said town of Lansing, as appears by the last preceeding tax-list or assessment-roll of said town of Lansing; that said petitioners do constitute and represent a majority of the tax-payers of said town of Lansing, as shown by the last preceeding tax-list or assessment-roll of said town; and that said petitioners do represent a majority of the taxable property upon said last preceeding tax-list or assessment-roll.

And I, the said county judge of Tompkins County, do further
101 adjudge and determine that the sum of seventy-five thousand
dollars mentioned in said petition does not exceed twenty per cent. of the whole taxable property of said town of Lansing, as shown by the last preceeding tax-list or assessment-roll of said town; and that all the requirements of law respecting the creation and issuing of the bonds of said town of Lansing, to the amount of seventy-five thousand dollars, for investment of the same or the proceeds thereof in the

stock or bonds, or both, of the Cayuga Lake Railroad Company, have been fully complied with by said petitioners.

And I, the said county judge, do further adjudge and determine: that it is expedient and proper that three persons, who are freeholders, residents and tax-payers within the corporate limits of said town of Lansing, be appointed and commissioned as commissioners for the purposes specified and contemplated in said petition. That John T.
102 Knettles, Darius Hall, and Alonzo H. Clark are freeholders, residents and tax-payers within the corporate limits of said town of Lansing, and are suitable and proper persons to be appointed and commissioned as such commissioners; and I, the said county judge, do appoint and commission the said John T. Knettles, Darius Hall, and Alonza H. Clark as commissioners, whose duty it shall be, with all convenient dispatch, to cause to be made and executed the bonds of said town of Lansing to the amount and for the purposes set forth in said petition; and whose further duty it shall be to discharge all such further and other duties as shall by law be required of them as such commissioners.

MILLS VAN VALKENBURGH.
Tompkins County Judge.

STATE OF NEW YORK,
Tompkins County, ss:

We, John T. Knettles, Darius Hall, and Alonzo H. Clark, all residents and tax-payers of the town of Lansing, Tompkins County,
103 New York, having been duly appointed and commissioned as commissioners for said town of Lansing for the purpose of issuing the bonds of said town to the amount of seventy-five thousand dollars (75,000), in aid of the Cayuga Lake Railroad Company, and for other purposes provided for in and by chapter nine hundred and seven (907) of the laws of the State of New York for the year 1869, do swear, and each of us doth for himself swear, that we will support the Constitution of the United States and the constitution of the State of New York, and that we will well, honestly, and faithfully discharge all the duties of our office as said commissioners according to the best of our ability.

(Signed) JOHN T. KNETTLES.
DARIUS HALL.
ALONZO H. CLARK.

Subscribed and sworn to before me this 31st day of August, 1871.
CHAS. G. DAY, *J. P.*

STATE OF NEW YORK,
Tompkins County, ss:

J. D. Tarbell, clerk of the county court of Tompkins, and of
104 the courts thereof, the same being courts of record, do hereby certify that I have compared the foregoing with the original affidavit of James A. Burr, in relation to the bonding of the town of Lansing for or in aid of the Cayuga Lake Railroad; also with the order of publication of M. Van Valkenburgh, Tompkins County judge, dated December, 1870; also, of the affidavit of Wesley Hooker, of the publication of said order; also, the order of M. Van Valkenburgh, appointing John T. Knettles, Darius Hall, and Alonzo H. Clark, as commissioners to execute the bonds of said Town of Lansing; also, the affidavits or oath of office of the said John T. Knettles, Darius Hall, and Alonzo H. Clark, and I do certify that it is a correct transcript therefrom and of the whole of said originals now in my office.

In testimony whereof I have hereunto subscribed my hand and affixed the official seal of said county at Ithaca, this sixteenth day of December, A. D. 1872.

[SEAL.] (Signed) J. D. TARBOLL, *Clerk.*

105 Defendant's counsel objected to this evidence:

1st. The petition on which said judgment was based is not and was not drawn in conformity with the statute and conferred no jurisdiction.

2nd. The petition does not contain any allegations, or in any manner set forth that the petitioners are or were a majority of the tax-payers of said town, whose names appear upon the last preceeding tax-list or assessment roll of said town, nor that they owned or represented a majority of the taxable property in the corporate limits of said town, but simply describes said petitioners as "residents" and others and whose names appear upon the tax-list and assessment-roll of the town of Lansing as owning "certain taxable property in the corporate limits of said town."

3rd. The said petition is defective so as to give no jurisdiction as aforesaid, because the petitioners did not by the terms thereof, thereby, and therein themselves determine and direct how the bonds of the

106 said town desired to be issued, or their proceeds should be invested, whether in the stock or the bonds of the said Cayuga Lake Railroad Co., it being insisted by defendant's counsel that such determination and directions as to in which, whether in said bonds or said stock, said investment was to be made should have been made and declared in and by said petition itself to be in compliance with the legislative act therein referred to.

4th. The petitioners in having failed to make and declare in said petition such election and determination by themselves (as by the express terms of said petition they did not), such petition was not in compliance with said act and gone no authority or jurisdiction to the said county judge to entertain the same, and upon it to proceed as he did.

5th. That in having upon such defective petition so proceeded to hear and to give said judgment for such bonding of said town, and for appointing commissioners in that behalf to act, said county judge acted throughout wholly without authority or jurisdiction, and

107 his acts therein, as well as the acts of the commissioners in issuing the bonds in question, were and are wholly unauthorized and void.

Further, the papers making up the judgment now offered in evidence, are objectional because they do not embrace any petition to and upon which the said county judge acted in giving such judgment; also they show on their face they are not the whole record.

The court overruled these objections and received the evidence, to which decision defendant's counsel excepted on each ground above stated.

Said judgment and other papers were thereupon read in evidence.

Plaintiff called as a witness ALONSO H. CLARK, who, being duly sworn, testified:

I was one of the railroad commissioners appointed by the county judge of Tompkins County, and reside in the town of Lansing. We issued 75 bonds as commissioners of the town of Lansing.

108 (Plaintiff's counsel here produced to the witness certain papers. Witness continued:)

These are the bonds we issued.

(It is conceeded there are 75 of them for $1,000, each numbered from No. 1 to No. 75, with semi-annual interest coupons annexed to each, all the bonds reading alike and all payable at one time; the coupons also reading alike, except as to the time of payment, and as to such time the coupons to all the bonds corresponding, each for $35.

Plaintiff's counsel offered the bonds in evidence, proposing to read one of said bonds with its annexed coupons as specimen of all the rest, the bond proposed to be read being No. 1 of the series with its coupons, so far as remaining undetached.

(Objected to by defendant's co'nsel:

1. On all the grounds above stated to the admission of the said judgment of the county judge; those objections being here restated.

2. Because for these reasons, the appointment of said com-
109 missioners was void, and they had no authority to issue any bonds that can be obligatory on said town of Lansing.

3. Because the bonds on their face being all made payable at one time, and more than 30 years from their date, are void.

4. The judgment of said county judge has no validity and did not confer any authority to issue bonds in behalf of the said town of Lansing, nor to subscribe for any stock of the Cayuga Lake R. R. Co. in behalf of said town, after the 12th day of May, 1871, for the reason that by an act of the legislature of the State of New York, passed on said 12th day of May, 1871, and which took effect that day (chap. 925, laws of 1871) and which became a law before said bonds were issued, and before the said commissioners subscribed for any stock of said R. R. Co., repealed so much of said act of 1869 (chap. 907) referred to in said bonds; that it distroyed the force and effect of said judgment of the county judge, and took away the power of the said commissioners thereby ap-
110 pointed to subscribe for any stock or to issue any bonds in pursuance of said act of 1869, and did not confer any authority upon them to subscribe for any stock or to issue any bonds in pursuance of said act of 1871.

4. And further, because plaintiff has not yet shown that any petition was ever made and presented to said county judge authorizing him to proceed and give the judgment here given in evidence and relied upon by the plaintiff.

These objections were overruled and the bonds received in evidence, to which decision defendant's counsel duly excepted.)

Thereupon plaintiff's counsel read in evidence bond No. 1 with the coupons thereto annexed, as a sample of all the other bonds and coupons, as follows:

(Copy bond.)

No. 1.] UNITED STATES OF AMERICA.

(Vignette.) $1,000. STATE OF NEW YORK.

Town of Lansing, County of Tompkins.

[Stamp 50c.]

Issued by virtue of an act of the legislature of the State of New York, entitled "An act to amend an act entitled an act to
111 authorize the formation of railroad corporations, and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869.

This act authorizes the town of Lansing, in the county of Tompkins, to subscribe to the stock of the Cayuga Lake Railroad Co., and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said act is $75,000.

Know all men by these presents that we, the undersigned commissioners, under the above-entitled acts, for the town of Lansing, in the county of Tompkins and State of New York, upon the faith and credit and in behalf of said town, for value received, promise to pay to the bearer the sum of one thousand dollars, on the first day of January, in the year one thousand nine hundred and two (1902), at the Fourth National Bank of New York, in the city of New York, with interest at seven per cent. per annum, from and after the first day of January, 1872, payable semi-annually on the first days of July and January in
112 each year, at the same place, on presentation and surrender of the coupons for such interest hereto annexed.

In witness whereof we have hereunto set our hands and seals, and have caused the coupons hereto annexed to be signed by Darius Hall, one of our number, this 1st day of October, in the year one thousand eight hundred and seventy-one.

COUNTY SEAL OF TOMPKINS CO.

(Signed) DARIUS HALL, [L. S.]
" ALONZO H. CLARK, [L. S.]
" JOHN T. KNETTLES, [L. S.]
Commissioners.

Registered in the county clerk's office of Tompkins County.

Copy of the 10th coupon, being the one of earliest date of payment, which is undetached.

$35. The Town of Lansing, county of Tompkins, with pay the bearer hereof, at the Fourth National Bank of New York, in the city of
113 New York, on the first day of January, 1877, the sum of thirty-five dollars for six months' interest, then due, of bond No. 1.

(Signed) DARIUS HALL,
Commissioner.

The witness, A. H. Clark, proceeded:

Mr. Knettles, one of the commissioners, is deceased. Darius Hall, the other, with myself, is living. We issued these bonds for railroad stock in the road.

(Paper presented.) This is my receipt given at the time.

(Read in evidence as follows:)

"Received of T. Delafield, treasurer, 750 shares of capital stock in the Cayuga Lake Railroad.

"Aurora, Oct. 14th, 1871."

(Signed) "ALONZO H. CLARK,
"*Commissioner.*"

Witness continued:

Mr. Delafield was treasurer of that company. I am acquainted with the signatures of those bonds and coupons; they are genuine—some coupons signed by one commissioner, some by another.

Plaintiff's counsel presented in evidence 75 coupons, detached from the bonds in question, which fell due January 1st, 1874.

(To their introduction defendant's counsel objected on each
114 and all the grounds hereinbefore stated to the judgment and bonds received in evidence.)

Question to witness by plaintiff's counsel:

Look at these coupons and see if they are signed by you, some of them, and some by Comm'r Hall or Knettles.

Ans. Yes, sir; some by one of them, and some by me.

Q. These were all attached to the bonds when issued, in October, 1871, were they?

A. Yes, sir.

Plaintiff's counsel offered in evidence all the coupons detached, 8 packages, 75 semi-annually-payable coupons in each package, each coupon for $35.

By DEFENDANT'S COUNSEL: We object to your bringing in the coupons which were involved in the Baily action.

PLAINTIFF'S COUNSEL: I don't care to bring in any of the coupons, except for the purpose of tendering them to you. My action is brought upon the bonds.

Question by plaintiff's counsel:

You made no provision in the bank for the payment of any interest, did you?

115 Ans. No, sir.

(The bonds and coupons were received and read in evidence, and the objections raised thereto overruled by the court, to which defendant's counsel excepted.)

This witness, being cross-examined, further testified:

Mr. Knettles died a year or two ago.

Question. Are these bonds now in the condition in respect to the seals that they were in at the time they were issued?

Ans. They are not. There are seals now after the names of the commissioners.

Ques. Were they there at the time you issued them?

A. They were not.

Q. Did you ever authorize or know that any one was directed to put them on?

A. Not to my knowledge. I never authorized any one to, nor did the other comm'rs, to my knowledge. I do not know who put them on. I know nothing about this seal of the county; it was not on when we issued them. We delivered these bonds to Mr. Delafield, treasurer. We took a bond of indemnity at the time.

(A paper shown witness.)

116 Q. Was that or one like it served on you?

Ans. I think it was, and about the time of its date. I could not swear to the date.

(Paper marked for identification.)

Q. In issuing these bonds, they were given over to whom?

A. To Mr. Delafield, treas'r of the co.

Q. Did you take the bond of i'demnity from them at the time of issuing the bonds?

A. Yes, sir.

(Plaintiff's counsel objects to this evidence.

Paper marked for identification.)

Plaintiff's counsel here offered in evidence an original judgment-roll between these parties, produced by the clerk of this court from its files, and duly filed July 11th, 1876, in the words and figures following:

United States circuit court, northern district of New York.

APRIL 7TH, 1874.

117 JOHN J. STEWART
vs.
THE TOWN OF LANSING.

On filing declaration in this case, and on motion of James R. Cox, plaintiff's attorney,

Ordered, That the defendant herein appear and plead thereto within twenty days after service on it of a copy thereof and notice of the entry of this rule or judgment, &c.

(A copy as entered.)

Witness my hand and official seal, at my office in Utica, this 8th day of April, A. D. 1874.

[SEAL.] CHARLES MASON, *Clerk.*

Pleas in the United States circuit court for the northern district of New York, of March term, 1874. That is to say, of the 30th day of March, 1874.

Declaration.

JOHN J. STEWART
vs.
THE TOWN OF LANSING, IN THE COUNTY OF Tompkins.

118 John J. Stewart, a citizen of the State of Louisiana, plaintiff in this action, by James R. Cox, of Auburn, N. Y., his attorney, complains of the said Town of Lansing, a municipal corporation of the county of Tompkins, in said district, defendants, by declaration filed in this cause, and not by writ of a plea of trespass on the case, as follows:

For that whereas heretofore by a certain act of the legislature of the said State of New York entitled "An act to amend an act entitled an act to authorize the formation of railroad corporations and to regulate the same," passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads, passed May 18th, 1869, it was in substance enacted that a majority of the tax-payers of any such municipal corporation, owning or repre senting a majority of the taxable property, might present their petition to the county judge of their county setting forth the facts as provided by said act, expressing their desire to aid in the construction of such railroad as
119 is named in said petition, and that thereupon the said county judge shall order a notice to be forthwith published in a newspaper published in such county, directed to whom it may concern, setting forth that upon a day therein named he will proceed to take proofs of the facts set forth in said petition; and it is further provided, that if at such time and place, upon taking such proofs, it shall appear satisfactory to him that such petitioners do constitute a majority representing a majority of the taxable property as aforesaid, that then the said county judge shall so adjudge and determine, and shall cause the same to be entered of record in the clerk's office of said county; such judgment and the record thereof to have the same force and effect as other judgments and records in courts of record in said State.

And it was further thereby enacted that if the said county judge should so adjudge and determine as aforesaid, he shall forthwith appoint and commission three freeholders of such town to be com-
120 missioners for the purpose of subscribing for the stock of such railroad and of issuing the bonds of such municipal corporation in payment therefor, and to discharge such other duties as are provided in said act and the acts amendatory thereof. But such bonds were not to be issued to an amount beyond 20 per cent. of the assessed valuation of such taxable property, as shown by the last preceeding assessment-roll; and such bond, were to be issued by said commissioners, sealed with their seals, payable at the expiration of 30 years with interest at 7 per cent. per annum, payable semi-an'ually, not to exceed in the aggregate the amount set forth in said petition.

And it was further enacted by said act that the said bonds should also bear interest warrnets (commonly called coupons) corresponding in number and amount with the several payments of interest to become due thereon, and that the several commissioners should subscribe, in the name of their said town, to the stock or the bonds of the said rail-
121 road corporation so named in the said petition to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the said bonds therefor at par; and that such municipal bonds so issued pursuant to the provisions of the said act should be a charge upon the real and personal property within the limits of said municipal corporation; the principal and interest thereof when due to be collected and paid in like manner as other debts and obligations and charges against the said municipal corporation.

And the plaintff further says that in pursuance of the said act, on or about the 10th day of December, 1870, certain petitions of the tax-paying inhabitants of the said town of Lansing were duly presented to Mills Van Valkenburgh, who was at that time the county judge of the said county of Tompkins, duly verified by the oath of one of the said petitioners, setting forth that such petitioners were such a majority of tax-payers representing such a majority of taxable property of Lansing as aforesaid, duly setting forth the desire of the said petitioners according to the said act of the legislature aforesaid; that the said town
122 of Lansing should create and issue its bonds to the amount of $75,000, and to invest the same, or the proceeds thereof, in the stock of the Cayuga Lake Railroad Company, which company was at that time a railroad corporation, formed and acting under the general railroad acts of the said State of New York, which tax-payers of the said town so petitioning claim to be a majority of the taxable inhabitants of the said town of Lansing, and represented a majority of the real and personal property of the said town appearing upon the last preceeding assessment-roll or tax-list of saidtown.

And thereupon the said county judge duly took cognizance of the said matter, and duly made his order according to said act, requiring public notice to be given by advertisement in a suitable newspaper published in said county, to the effect that on the 24th day of December, 1870, at his office, in Ithaca, at 10 o'clock in the forenoon, he, the said county judge, would proceed to take proofs of the allegations in said petitions, and of the facts therein set forth under and accord-
123 ing to the said act of the legislature aforesaid, which notice was duly published as required by said act in the "Ithaca Journal," a newspaper published weekly in the said county of Tompkins.

And thereupon, afterwards and at the time and place so appointed, the said county judge did proceed to take the proofs as aquired by said

act, and upon such taking, the same being duly held and concluded, he, the said county judge, did find, ascertain, and judicially determine, under and according to the provisions of the said act, that the said petitioners whose names appeared upon said petition duly executed and signed the same; that they were tax-payers of the said town, as appeared by the last preceding tax-list or assessment-roll of said town; that the sum of $75,000 mentioned in said petition was less than 20 per cent. of the whole taxable property of the said town appearing by said tax-list and roll; and that all the requirements of law respecting
the creation and issuing of the bonds of said town to the amount
124 of $75,000, and for the investment of the same in the stock of the said The Cayuga Lake Railroad Company, had been fully complied with by said petitioners.

And thereupon the said county judge did duly make up a record of judgment to the effect aforesaid, and did duly file the same and cause the same to be duly recorded in the office of the clerk of said county, on the 21st day of March, 1871, according to the said act, and the same still remains of record; and by which judgment and order the said county judge did then and there duly appoint three freeholders, residents, and tax-payers, of said town, commissioners under the said act; that is to say, one Darius Hall, one John T. Knettles, and one Alonzo H. Clark, who were thereby authorized and required, with all convenient despatch, to make and execute the bonds of the said Town of Lansing under the said act, and likewise to do, execute, and perform all other the duties as such commissioners devolving upon them under the provisions of the act aforesaid.

And thereupon, afterwards, the said commissioners, Hall, Knet-
125 tles, and Clark, did duly qualify to the said office, and enter upon the discharge of the duties of the same, and did duly subscribe, in the name of the said Town of Lansing, for seven hundred and fifty shares of the capital stock of the said the Cayuga Lake Railroad Company, on or about the 19th day of September, 1871; and afterwards, and in further performance of their duty, and according to the said order and judgment of the said county judge, they did create and issue, sealed with their seals, signed with their names, and certified by said commissioners, the bonds of the said Town of Lansing to the amount of seventy-five thousand dollars, each bond being for $1,000 of principal, payable in 30 years from date, and bearing interest, payable semi-annually, on the 1st days of January and July in each year, with coupons or interest warrants attached, signed by one of the said commissioners, in the usual form, to each bond for the payments of the half-yearly interest, as the same should thereafter become due, copies of which are hereinafter set forth. And thereupon, on or about the 19th day of September,
126 1871, they, the said commissioners, duly paid the said the Cayuga Lake Railroad Company for the said stock so subscribed for as aforesaid, by exchanging the said bonds and interest warrants or coupons to the amount of $75,000 for the said 750 shares of stock, at par; and then and there the said Town of Lansing received and accepted, by said commissioners, the certificates for the said stock, and became and was, and still remains, a stockholder in said railroad company to the amount of 750 shares of its capital stock, which stock had ever since been owned and held by the said town.

And afterwards the said railroad company, in the usual course of its business, negotiated and sold, and for value transferred, the said bonds to various purchasers, and the same, with the coupons attached, became

the property of divers persons, and among others of this plaintiff, who now owns and holds a large portion of the same; and in particular this plaintiff owns and holds the interest warrants or coupons of said bonds, as hereinafter stated and set forth, as follows:

127 The said plaintiff, for a 1st cause of action, states to the court that on or about the 19th day of September, 1871, the said defendant, being a municipal corporation, as aforesaid, duly organized under the laws of the State of New York, executed and delivered, in connection with one of said bonds, a negotiable instrument in writing commonly called a coupon, of which the following is a copy:

$35.

The town of Lansing, county of Tompkins, will pay the bearer hereof, at the Fourth National Bank of New York, in the city of New York, on the 1st day of July, 1873, the sum of thirty-five dollars, for six months' interest then due on bond No. 1.

(Signed) DARIUS HALL,
Commissioner.

(Following this were one hundred and forty-nine other causes of action, separately set forth in the same language as the above first cause of action, except that the numbers of the bonds are stated consecutively from No. 2 to No. 75 in the coupons stated as falling due July

128 1st, 1873; and except that seventy-five of the causes of action are for coupons falling due January 1st, 1874, from the same bonds, numbering from No. 1 to No. 75, all the coupons being each for $35; and except, further, that some of the 150 coupons thus counted on are signed by one commissioner and others by one of the other commissioners.)

Wherefore the said plaintiff demands judgment against the said defendant for the sum of $2,625, with interest from July 1st, 1873, and for the further sum of $2,625, with interest from January 1st, 1874; in all, five thousand two hundred and fifty dollars, besides the costs and disbursements of this action.

Dated April 4, 1874.

JAMES R. COX,
Of Auburn, N. Y. Attorney for Plaintiff.

Circuit court of the United States in and for the northern district of New York, of the March term, in the year 1874, that is, of the 30th day of April, 1874.

JOHN J. STEWART
vs.
THE TOWN OF LANSING, IN THE COUNTY OF Tompkins.

129 I. And the said defendant, by Milo Goodrich, attorney for the defendant, comes and defends the wrongs and injuries, when, &c., and says that the defendant did not undertake and promise in manner and form as the plaintiff in his complaint or declaration herein, and in the several counts therein, hath above thereof complained against the defendant; and of this the said defendant puts itself upon the country, &c.

II. And for a second or further plea or answer to the said several counts and causes of action alleged and set forth in said complaint or declaration, the said defendant denies each and every allegation in said complaint or declaration contained.

III. For a third and further plea or answer and ground of defense to the said several causes of action, the defendant says and alleges that the signatures of the several, and of each and every, of the tax-payers of the said Town of Lansing to the said pretended petition or petitions mentioned in the said complaint or declaration as having been presented to the said county judge of the said county of Tompkins for the purpose, at the time, and in the manner as therein set forth,
130 were, and each of them was, obtained by fraud, in that the said tax-payers were induced to give their said signatures by the following false representation made to them, and each and every of them, by the person or persons obtaining said signatures, to wit, that the said Cayuga Lake Railroad Company was then a duly organized company and corporation, and then had a legal and valid existence as such; that the road to be constructed by the said pretended company or corporation was, by its articles of association, located to pass along and upon the east shore of Cayuga Lake, through the said town of Lansing; and that the several pretended persons and tax-payers whose names appeared on said petition or petitions had been given and signed by such persons respectively freely, and from their desire to aid in the construction of said railroad in the manner as therein set forth; whereas, in truth and in fact, each and every of the said representations at the time of the making thereof was untrue, to the knowledge of the person or persons so making the same, and thereon and thereby obtaining such signatures aforesaid; and whereas also,
131 in truth and in fact, many of the said pertended signatures were wholly fictitious, and were never made or given by the persons represented by such names.

IV. For a fourth and further plea or answer and ground of defense to the said several alleged causes of action, the defendant further alleges that at the said time and times of the presenting of the said petition to the said county judge, and of the said proceedings thereon had as set forth in said complaint or declaration, the said pretended Cayuga Lake Railroad Company was not duly organized, and the same did not have any legal or valid corporate existence, nor has the same ever been duly incorporated as such company or corporation, under and pursuant to the act or acts of the legislature of the said State of New York mentioned or referred to in said complaint or declaration; that the said pretended petition was wholly insufficient and not in compliance with the requirements of the said act or acts; that the said pretended petitioners whose names appeared thereon did not embrace a majority of the tax-
132 payers, representing a majority of the taxable property, of the said Town of Lansing, as appearing upon the then last preceeding tax-list or assessment-roll thereof, in conformity with the requirements of the said act or acts; that the said pretended petition did not embrace, nor did it purport to embrace, or to be made or presented by, nor did the said petition or petitions embrace, or purport to embrace, a majority of the tax-payers of the said Town of Lansing whose names appear on the said tax-list or assessment-roll thereof as owning or representing a majority of the taxable property in the limits of said town, in conformity with the requirements of said act or acts; and there was in the said proceedings before the said county judge no verification or proof made that the said petition or petitions were made or presented by a majority of the tax-payers, owning or representing a majority of such taxable property, in conformity with the requirements of said act or acts.

And so the defendant avers that the said county judge did not aquire, and never had, and did not possess the right, authority, and

jurisdiction to entertain the application aforesaid, or to proceed
133 to hear, determine, and adjudge in manner and form as set forth in said complaint or declaration.

V. For a fifth and further plea or answer and ground of defense to said several alleged counts or causes of action, the defendant further alleges that upon and after the conclusion of the said proceedings before, and the making an entry of the said decision and judgment, by, the said county judge, to wit, on or about the 27th day of March, 1871, upon due application made by Roswell Beardsley and others, residents, freeholders, and tax-payers of the said Town of Lansing, who had appeared in the before-mentioned proceedings before the said county judge, and by their petition in writing, duly verified, traversed the matters alleged in the before-mentioned petition or petitions, a writ of certiorari at common law was duly allowed and issued in due form of law out of the supreme court of the said State of New York, directed to the said county judge for the review, and determination by the said supreme court touching the validity or in-
134 validity of the before-mentioned proceedings and judgment before the said county judge; that the said writ was thereupon duly served upon the said county judge, whose return in obedience thereto dated on or about September 1st, 1871, and duly filed in the office of the clerk of the said supreme court in said Tompkins County, on or about the 8th day of January, 1872, whereby such proceedings and judgment before the said county judge were duly removed into and before the said supreme court and the justices thereof, in the sixth judicial district, for the review and determination aforesaid, according to the rules and practice of said supreme court.

That thereupon, in the said supreme court, before the justices, and at general term thereof, held at the city of Albany, in the said State of New York, on the first Tuesday of March, 1872, the parties relators and respondents having then and there respectively appeared, and having also been respectively and fully heard in respect to the matters presented by the said return, and then and there duly submitted by them to the said supreme court, and afterwards, at a general, term, and before the justices of such supreme court, held at the city of Elmira,
135 in the said State of New York, on the first Tuesday of May, 1872, such matters aforesaid, and the premises connected therewith, having been duly considered by the said supreme court, and the justice thereof, it was then and there, by the said justices and the said supreme court, and by the order and decision of the said court, duly made and entered, ordered, adjudged, and determined, by the said supreme court that the before-mentioned proceedings before the said county judge be and the same thereby were, in all things reversed.

That in pursuance of such order, decision, and determination, and on or about the 27th day of May, 1872, the judgment of the said supreme court in the premises, in due form of law, was regularly and duly made and entered, and the judgment-roll thereof duly filed, and such judgment in all respects duly perfected and entered of record in the clerk's office aforesaid, whereby it was and is by the said supreme court ordered, adjudged, and determined that the before-mentioned proceedings, judgment, and determination by the said county judge in respect to the issuing of the said bonds which are mentioned in said
136 complaint or declaration were and are in all things reversed, annulled, and held for naught, which said judgment in the before-mentioned clerk's office still remains of record and of full force and virtue.

And the defendant alleges that at the time of the issuing and service of the said writ of certiorari, and the said proceedings thereon, due notice of the same and of the invalidity of the said proceedings and judgment before the said county judge was had by the said pretended commissioners, and also by the said pretended railroad company, and the directors, officers, and agents thereof, and that such writ was so issued and served, and such notice thereof was had by the commissioners, company, directors, officers, and agents aforesaid, long before the alleged issuing and disposal of the said bonds by the said pretended commissioners, and long before the said alleged purchase thereof, or of any part or portion of the same, or of the coupons annexed thereto, by the plaintiff.

137 VI. And for a sixth and further plea or answer and ground of defence to the said several alleged counts or causes of action, the defendant further alleges that at the time of the issuing of the said writ of certiorari, and afterwards, the said pretended Cayuga Lake Railroad Company, and the said directors, officers, and agents thereof, and the said pretended commissioners named in the said complaint or declaration, and likewise the said plaintiff, severally and respectively, had full notice of the issuing and service of the said writ and of the said proceedings thereon as herein above set forth, and that the plaintiff had full notice thereof, and of the invalidity of the said bonds, and of the defenses thereto, which are herein set forth and contained.

That with such notice, and well knowing that said pretended commissioners had no power or authority whatever to issue said bonds for or on the part of said Town of Lansing, they, the said pretended commissioners, at the instigation of the said railroad company, its officers and agents, and wrongfully in form, issued or pretended to issue,

138 said bonds, with the coupons attached, and in form, but wrongfully and without authority, as aforesaid, exchanged or pretended to exchange the same for the pretended stock of the said railroad company.

That, with the like notice and knowledge aforesaid, the said company, its officers and agents, took and received said pretended bonds upon said pretended but unauthorized exchange.

That said stock so exchanged the said defendant has never received or in any manner excepted, nor have any of its authorized agents received or accepted the same or any part thereof.

That the said bonds, stock, and exchange herein set forth are the same bonds, stock, and exchange mentioned in said complaint or declaration; that the said several coupons mentioned in said complaint or declaration are a part of the coupons from the said unauthorized bonds; that the same, so far as held by the plaintiff, were transferred to him long after the issuing of the said writ of certiorari, and after the

139 aforesaid judgment thereon by the said supreme court was entered and perfected as aforesaid, and were transfer'ed to him without his paying therefor any valuable consideration, and with full notice of their invalidity as herein set forth, and with notice likewise of the said judgment of said supreme court.

VII. And for a seventh and further plea or answer and ground of defense to the said several alleged counts or causes of action set forth in said complaint or declaration, the defendant alleges and avers that the said coupons and promises so mentioned in said complaint or declaration are a part of the coupons from the unauthorized bonds herein above mentioned; that the same remained attached and annexed to their respective bonds until long after said judgment of the said supreme court

was perfected and entered as aforesaid; that all of the said bonds, with all their coupons annexed thereto, remained in the hands of said railroad company as owner and holder thereof; that the alleged transfer thereof from said company, and the plaintiff's pretended title to
140 the portion of the same for which this suit is prosecuted, was acquired, and such transfer from said company took place, long after the entry of such judgment of said supreme court; that the plaintiff took the transfer thereof to him without paying any valuable consideration therefor, and with full notice as aforesaid, and for the sole purpose and to the end that an action might be prosecuted thereon in this court.

Wherefore the defendant demands judgment that the plaintiff's complaint or declaration be dismissed with costs.

(Signed) M. GOODRICH,
Attorney for Defendant.

United States of America, for the northern district of New York, in the second circuit, held at the city of Albany, on Wednesday, the 13th day of October, in the year of our Lord one thousand eight hundred and seventy-five.

Present, the honorable William J. Wallace, judge.

141 JOHN J. STEWART
vs.
THE TOWN OF LANSING.

On filing stipulation signed by the attorneys for the respective parties, and on motion of H. D. Donnelly, defendant's attorney, ordered that this cause may now be called for trial, a jury being waived, and may be brought to a further hearing before Hon'l W. J. Wallace, at his chambers, in Syracuse, at any time in November next, on a notice of eight days, with the same effect to all intents as if the trial was concluded at this term.

Defendants to pay, as a condition, a counsel fee of one hundred dollars to plaintiff's counsel, and also the witnesses' fees incur'ed or paid by plaintiff.

United States circuit court, northern district of New York.

JOHN J. STEWART
vs.
THE TOWN OF LANSING.

This action having been brought on for trial at a stated
142 term of this court, held at the city of Albany, in and for the northern district of New York, on the second Tuesday of October, 1875, and a trial by jury having been waived by the stipulation of the parties filed, and the action having been tried before the undersigned, the judge presiding at said term, after hearing the evidence and arguments of counsel, I find and decide that the defendant is indebted to the plaintiff upon the coupons set forth in the declaration in the amount of $2,625 with interest from July 1st, 1873.

That the plaintiff is entitled to judgment, and judgment is accordingly ordered for the plaintiff, for $2,625, with interest in the sum of $551.25, amounting in all to $3,176.25, with costs.

Dated July 1st, 1876.

(Signed) WILLIAM J. WALLACE.

United States circuit court, northern district of New York.

JOHN J. STEWART
vs.
THE TOWN OF LANSING.

This cause having been brought on for trial at a stated term of this court, held at the city of Albany, on the second Tuesday of October, 1875, and a trial by jury having been waived by the stipulation of the parties filed, and the action having been tried before the honorable William J. Wallace, the judge presiding at said term, and the court having found and decided that the plaintiff is entitled to judgment against the defendant for the sum of three thousand one hundred and seventy-six dollars and twenty-five cents debt and damages, with costs:

Now, on motion of James R. Cox, plaintiff's attorney, it is ordered and adjudged that the plaintiff, John J. Stewart, do recover of the defendant, the Town of Lansing, the sum of three thousand one hundred and seventy-six dollars and twenty-five cents debt and damages aforesaid, together with the sum of one hundred and ten dollars and ninety-five cents for his costs and disburs'ments of this suit, as taxed,
144 amounting in the aggregate to the sum of three thousand two hundred and eighty-seven dollars and twenty cents.

Judgment signed this 11th day of July, 1876.

(Signed) CHARLES MASON, *Clerk.*

Defendant's counsel objected to this evidence, because plaintiff has not proved jurisdiction in the county judge to render a judgment or appoint commissioners, or anything at all to charge the Town of Lansing; also, because it is not pleaded and because it cannot be an estoppel in any other action upon a different set of coupons.

Defendant's objections were overruled, and defendant duly excepted.

The said judgment-roll was thereupon received and read in evidence.

JAMES R. COX being duly affirmed, testified:

I have made a computation of the interest claimed to be due. The principal of each set of semi-annual coupons is $2,625; upon the eight sets, four years' interest. It amounts to $21,000, and the
145 interest from the time they fell due amounts to $4,174.64, making total twenty-five thousand one hundred and seventy-four dollars $\frac{64}{100}$ ($25,174.64).

Cross-examined:

Q. You have computed the amount by taking all the coupons?

A. Except those which are in the former judgment; eight sets of coupons, covering all the time since the bonds were issued (with the exception of the coupons in the other judgment).

Q. You took then the coupons that were brought into the Bailey action?

A. I have nothing to say about the Bailey action. As counsel I shall object to any such evidence. I have nothing to say about Bailey.

Q. I shall insist on an answer.

By the court:

You must answer the question.

By defendant's counsel:

Q. Have you brought into this action now here before the court the coupons you did bring into the Bailey action when that was tried?

Mr. COX. As counsel, I propose to object to that question.

The COURT. You may answer the question.

146 A. I have answered it, I claim, by answering that I have got all the coupons here except those in the Stewart judgment. My objection as counsel is that there is nothing properly before the court upon the subject of Bailey or his action.

By the court:

Your objection is overruled.

(Exception taken by plaintiff's counsel.)

Q. Have you brought into the computation you have made and now submitted to the jury the very coupons you did bring in and submit as counsel for Bailey in the Bailey action, tried before Judge Wallace?

A. They probably lie upon the table here; I have not read them.

Question repeated.

A. I have; they are in that paper there tied up.

Q. What is their amount?

A. I think they were the coupons of July, 1872, but I am not certain.

(Paper presented witness.)

147 Q. There is a copy of the complaint in that action; see if that does not assist you in determining the amount; that appears to be in your handwriting, does it not?

A. Principally my son's handwriting, I think.

Q. It was issued by you as attorney, was it not?

A. Either by me or by him; it has not been pleaded in this action, and I object therefore to it. I think it is undoubtedly a copy of the complaint that was served in that case. The amount, interest and all, is $3,537.99 of coupons of July, 1872.

(Complaint marked C, for identification.)

Q. The two actions, the Bailey action and the first Stewart action, were tried at the same time before Judge Wallace, were they not?

A. I object to that on the ground that there is no ground for any evidence upon that subject.

(Objection overruled and exception taken by plaintiff's counsel.)

A. The two were tried together, at Syracuse, and the Bailey action was tried under the complaint or declaration shown. I was plaintiff's attorney in both cases, and tried both.

148 Q. Do you say, since the trial of the Bailey action, there has ever been any transfer by Bailey to Steward of the coupons that were embraced in that Bailey action?

A. I have not said anything on the subject.

Q. Do you know whether there has been any transfer or not?

A. I know only from what I am told by others.

Q. Have you kept the coupons in your hands ever since?

A. No, sir; they have been out of my possession; I think in the possession of Mr. Tryon, of New York.

Q. Who is Mr. Tryon?

A. He used to live in New York; has recently removed to Hartford, Conn. He was a friend of Mr. Bailey, I believe, and one of the firm of Allen, Stevens & Co., bankers, in Pine st.

Q. Has he any connection with Stewart?

A. Not to my knowledge.

Q. You had these Bailey coupons in court at the time the action was tried?

A. Probably I did.

Q. They were presented in that case?

A. They were, I have no doubt, altho' I do not recollect the fact at this moment.

Q. How soon after did you hand them to Mr. Tryon?

149 A. It has passed out of my mind entirely; I don't remember when I got them from Judge Wallace, nor what I did with them.

Q. Have you any knowledge or recollection that you did hand them to Mr. Tryon?

A. I have not a very distinct recollection. I have a slight recollection or impression upon that subject. They were out of my possession for quite a time.

Q. Who did you hand them to when they passed out of your hands?

A. I cannot state with certainty.

Q. According to your best recollection?

A. I have but one kind ever; I have no particular recollections upon the subject.

Q. Well, you have now got them?

A. I think I have, right here.

Q. When did you get them?

A. That I don't recollect.

Q. Who did you get them from?

A. I don't know; I have no recollection.

Q. Do you know when you got them?

A. That I can't say.

Q. Do you say before this court and jury that you don't know when you got those coupons in the Bailey action?

150 A. I do not, sir; I haven't any recollection.

Q. Who did you first give them over to after the Bailey action?

A. I don't remember.

Q. From whom did you get them after the Bailey action?

A. I have no recollection on the subject.

Q. Do you say that?

A. I say that.

(It was here conceded that these 75 bonds are the only bonds ever issued to the Cayuga Lake Railroad Company by the Town of Lansing.)

Plaintiff's counsel read in evidence two depositions of William Elliott, taken on part of plaintiff, in Philadelphia, July 18th and Aug't 26th, 1876.

Omitting formal parts of the depositions, the testimony of the witness thus given in the cause was as follows:

In the first depositions the witness, WILLIAM ELLIOTT, being duly sworn and examined by Mr. Cox, for plaintiff, testified:

151 I reside in the city of Philadelphia, Penn.; am engaged in the banking business.

In the years 1871, 1872, & 1873 I was a member of the firm of Elliot, Collins & Co., bankers, of Philadelphia, doing business at 109 S. 3rd street.

That firm was composed at that time of myself, Mr. Collins, and my two sons.

I did business at that time for Cayuga Lake R. R. Co.

The treasurer of the R. R. co. at that time was T. Delafield, of Aurora, N. Y.

I had transactions with him for the R. R. co. in reference to some bonds of the Town of Lansing issued in aid of the Cayuga Lake R. R. Co.

The amount of bonds was $75,000, with coupons attached.

I received these bonds from the Cayuga R. R. Co. as collateral for a loan of $50,000.

The loan was made on the 26th day of November, 1872, at four months.

The company received credit on that day for their note negotiated by us for $47,808.36 on this collateral, the avails of the note for $50,000.

The company drew this money and some more.

152 We did not sell the bonds at all.

The bonds, on the 8th day of February, 1873, we parted with. The cash we received on parting with them was $54,337.50. I have never seen any of the bonds since.

The loan negotiated by us was paid in this way.

Up to this time the loan had not been paid

It was paid by this money.

Cross-examination by Mr. GOODRICH, for defendant:

The amount of $54,337.50 was not the amount of the indebtedness to us by the Cayuga Lake R. R. Co.

They had a running account with us.

The account at that time was more than that.

About $6,000 beyond the amount paid us.

The whole amount included the original loan—which they drew out.

The money we received on parting with the bonds was placed to their credid as so much paid of their liability to us.

They drew on us on the 13th of Feb'uary, 1873, or we have a charge to them subsequent to that for $21,290.88.

They had transactions with us subsequent to February 13th, 1873.

153 They were not numerous, but considerable in amount.

The R. R. co. is still indebted to us.

Q. Please state whether their indebtedness to you is small or considerable.

A. Considerable.

Q. Please state the date of your last transaction with the R. R. company.

A. This I can only answer by referring to our books.

Q. Would your books show?

A. Of course they would.

Q. From recollection can you state whether you had transactions with them in the year 1874?

A. I cannot in 1874.

Q. Can you say from recollection, indepen'ent of the books, if you had transactions with them in 1875?

A. I cannot.

Q. Independently of the books, can you state from your recollection the date and year of your last transaction with the company?

A. Of course I cannot.

Q. Have you made your answers both on cross and direct examination from what appears by your books?

154 A. Of course I have, and I have been governed in my answers by what appears on my books solely.

I do not keep the books. The books were kept by my son, A. W. Elliott, and another who kept the scrap-book.

I cannot tell if all the original coupons were attached to the bonds or not when we received them.

We received no other collaterals with the bonds.

The note was signed by T. Delafield, treas'r of the Cayuga Lake R. R. Co.

It was the company's note, signed by T. Delafield, treas'r.
There were no other parties to the note.
We were private bankers at that time and have been since.
The firm has since changed by the retirement of Mr. Collins and the death of my son.
I cannot tell through whom personally we received the bonds.
Think we received them by express.
They were negotiated by Mr. Delafield, either personally or by letter.

155 All our transactions with that company have been done through Mr. Delafield, with whom I have been acquainted since, I think, 1871.

My first acquaintance with him arose in connection with this R. R. co. My personal relations with him are friendly, and he calls to see me when he visits Philadelphia.
He last called to see me, I think, about a month ago, in this city.
I am personally acquainted also with almost all the members of that R. R. co. I have visited the section of that R. R. co. some three or four times since the road was built.
I am not acquainted with John J. Stewart, the plaintiff in this action.
I do not know where he lives or in what State he lives.
Neither myself or my banking firm ever had any transactions with him, to my knowledge.

(Signed) WILLIAM ELLIOTT.

Subscribed and sworn to before me this 18th day of July, 1876.

SAMUEL BELL,
U. S. Comm'r.

156 In the second deposition the witness, William Elliott, being duly sworn and examined by Mr. Cox, testified:

I am the same witness that was examined on the part of the plaintiff in this case on the 18th day of July, 1876.
(Plaintiff presents Exhibits A and B.)
I recognize these papers; they are the two notes negotiated by us with the $75,000 of the Town of Lansing bonds as collateral for the Cayuga Lake Railroad Co.
The transaction was made on the 26th day of November, 1872.
(Plaintiff presents exhibit marked C.)
This is a draft on us for $48,812.50, proceeds of the negotiation of the loan, drawn in favor of Leonard, Sheldon & Foster, bankers, in New York City.
It was paid by us.
(Plaintiff presents exhibit marked D.)
This is a statement of the sale of said Town of Lansing bonds by the firm of Elliott, Collins & Co.

157 The sale was made at the time it bears date, Febr'y 8th, 1873; it was made out and sent to the Cayuga Lake R. R. Co. at its date.

I said in my previous examination that we did not sell the bonds in question. I intended by that to say that we did not make the negotiation for the sale of them, but that they passed through our hands, under terms which were agreed on by others.
The price at which they were sold we were consulted about and our advice asked.
We received the money and delivered the bonds—on that day.

Cross-examination by Mr. GOODRICH, for defendant:

I do not wish to change but merely explain my testimony given at the previous examination.

Exhibit D is in the handwriting of my son, who generally makes out the accounts, Adolphus William Elliott. He is still living in this city.

To my present recollection the first time I saw Exhibit D is to-day.

Q. Have you any recollection now of ever having seen it before?

A. I have not.

158 The statements first credits the Cayuga Lake R. R. Co. with $54,337.50, under date of Feb'y 8th, 1873, that being the avails of the sale of the bonds. It then debits them with the amount of the two notes, Exhibits A and B, $50,000.00, less the rebate for unexpired time of the notes not yet due, 49 days.

Interest, $408.33, the nett amount of debit being $49,591.67.

This sum is deducted in the statement from the credit of $54,337.50, showing balance of $4,745.83; under that balance is placed the same amount to the credit of the Cayuga Lake R. R. Co., opposite the words "credit Cayuga Lake."

Q. Do you know to whom that statement was given by your house, if it was given to any one?

A. It was sent to the Cayuga Lake R. R. Co. at the time, as I have stated before.

Q. Do you still say that you have no personal knowledge of any sale made of these bonds to Mr. Stewart, the plaintiff in this action?

A. I do; I have no knowledge of Mr. Stewart; I mean the Mr. Stewart who is plaintiff in this action.

159 Q. You stated before that you had no personal knowledge of any business transaction whatever between either yourself and Mr. Stewart or your house and Mr. Stewart. Do you still say so?

A. I do.

Q. Have you any personal knowledge whatever that these bonds ever passed into the hands of the Mr. Stewart the plaintiff in this action?

A. No; I have not.

Q. Have you any personal knowledge that the plaintiff in this action ever purchased these bonds or ever paid one dollar or any other sum for them?

A. I have not. Somebody paid for them and we got the money.

(Counsel for defendant objects to last clause in answer of witness, as not responsive to the question.)

Redirect examination:

Exhibit D is the usual printed form used in our office at that time, and is in the handwriting of my son, a partner in the firm, and it
160 was his department of the business to make out such statements.

Recross-examination.

Q. Are those blanks the same blanks unused still on hand in your house?

A. I do not know whether they are or not. They have not been in use in our office since the dissolution of the firm in 1873, and I have not seen any since.

(Signed) WILLIAM ELLIOTT.

Subscribed and sworn to before me this 26th day of August, A. D. 1876.

[SEAL.] (Signed) SAMUEL BELL,
U. S. Comm'r.

EXHIBIT A.

$25,000.] AURORA, N. Y., *Nov.* 26, 1872.

Four months after date I promise to pay to the order of myself twenty-five thousand dollars, without defalcation, for value received,
161 having deposited herewith thirty-eight thousand bonds of the Town of Lansing, N. Y. ($38,000), which I authorize the holder of this note, upon the non-performance of this promise at maturity, to sell, either at the brokers' board or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary expenses and charges, holding myself responsible for any deficiency. Payable at Elliott, Collins and Co.

Due March 29th, 1872.

(Signed) T. DELAFIELD,
Treas. Cay. Lake R. R. Co.

(Endorsed:)
T. DELAFIELD, *Treas.*

EXHIBIT B.

$25,000.] AURORA, N. Y., *Nov.* 26, 1872.

Four months after date I promise to pay to the order of myself twenty-five thousand dollars, without defalcation, for value received, having deposited herewith thirty-seven thousand bonds of the Town of Lansing,
N. Y. (37,000), ex January coupon, which I authorize the holder
162 of this note, upon the non-performance of this promise at maturity, to sell, either at the brokers' board or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary expenses and charges, holding myself responsible for any deficiency. Payable at Elliott, Collins and Co.

Due March 29th, 1872.

(Signed) T. DELAFIELD,
Treas'r Cay. Lake R. R. Co.

(Endorsed:)
T. DELAFIELD, *Treas'r.*

EXHIBIT C.

$48,812.50.] NEW YORK, *Nov. 27th*, 1872.

Pay to the order of Leonard, Sheldon and Foster forty-eight thousand eight hundred and twelve $\frac{50}{100}$ dollars, value received, and charge the same to account of

T. DELAFIELD,
Treasurer the Cayuga Lake Railroad Co.

163 To Mess's ELLIOTT, COLLINS & CO.,
Philadelphia, Pa.

(Endorsed:)
LEONARD, SHELDON & FOSTER.

Pay 1st Nat'l Bank, Phil'a, or order.

A. LANE, *Cash'r.*
G. PHILLEO, *Vice-Pres't.*

EXHIBIT D.

[Elliott, Collins & Co., bankers, 109 So. Third st.]

PHILADELPHIA, *Feb'y* 8, 1873.

Cayuga Lake R. R. Co.

75,000 Town of Lansing bonds	$54,337 50
Notes March 29, $50,000, 49 days' interest, 408.33	49,591 67
	$4,745 83

Credit Cayuga Lake, $4,745.83.

And the plaintiff rested his case.

164 Defendants called O. P. HYDE, who, being sworn, testified as follows:

I am county clerk of Tompkins County, N. Y., and personally superintended the business of the office. I have the judgment-roll on file in the office of the bonding proceedings in the case of the Town of Lansing for the Cayuga Lake Railroad Co.

(Witness producing the same.)

Q. That is the roll on file in the certiorari case?

A. Yes. I have no other judgment-roll than this. It was filed May 27th, 1872; the original roll is here.

Defendants offers the same in evidence.

(Objected to by the plaintiff's counsel as immaterial, and that it was the proceeding between other parties in no way connected with plaintiff. Objections overruled and evidence received, to which plaintiff's counsel excepted.)

The roll was read in evidence on the part of the defence, and is in substance and effect as follows:

The same is in due form a judgment-roll of the final judgment
165 of reversal by the supreme court of the State of New York, in an action entitled and duly brought and prosecuted in that court by common-law writ of certiorari, in the name of the people, on the relation of Roswell Beardsley and others, resident freeholders and tax-payers in the said Town of Lansing, against the said county judge of Tompkins County, Mills Valkenburgh, to obtain there a review of the proceedings had before that officer, and of his decision and judgment in pursuance thereof, given and entered of record in the town-bonding case in question.

The writ, in due form applied for, allowed, and issued March 27th, 1871, and duly served upon the county judge, makes a part of the roll; likewise the roll contains the return in obedience to the writ, made by said county judge September 1st, 1871, the body of which being as follows:

The return of Mills Van Valkenburgh, county judge of Tompkins County, to the writ of certiorari hereto annexed.

166 By virtue of and in obedience to the writ of certiorari hereto annexed, and to me directed, I do hereby certify and return to the justices of the supreme court that on the 10th day of December, 1870, the petition of James A. Burr and others, tax-payers of the Town

of Lansing, in said county of Tompkins, with an affidavit of verification thereto annexed, was presented to me, which petition and affidavits are hereto annexed, marked A; that I did thereupon, on the same day, to wit, the 10th day of December, 1870, make an order for the publication of the notice of the taking of the proofs of the allegations in said petition, and of the facts therein set forth, as to the number of tax-payers joining in said petition, and as to the amount of taxable property represented by them, and of such other facts as might properly be inquired into under the provisions of chapter 907 of the laws of 1869, a copy of which order is hereto annexed, marked B.

That I did thereupon forthwith cause to be published a notice of the time and place for the taking of such proofs, a copy of which
167 notice, with the proof of the publication thereof, is hereto annexed, marked C.

That at the time and place in said notice specified, to wit, the 24th day of December, 1870, at 10 o'clock in the forenoon, at the office of the county judge, in Ithaca, I did proceed to take the proofs of the allegations and facts aforesaid, which proofs are hereto annexed, marked D.

That at the taking of said proofs Marcus Lyon, esq., appeared as counsel for the petitioners; O. G. Howard, esq., appeared as counsel for Roswell Beardsley and others, tax-payers of said Town of Lansing, in opposition to said petition; that after the taking of said proofs and the hearing of the arguments of the respective counsel, the matter was duly submitted to me, and after due deliberation I did, on the 20th day of March, 1871, make, and cause to be entered of record in Tompkin's County clerk's office, a judgment in the matter of said petition, of which judgment a copy is hereto annexed, marked E.

All which I do hereby certify and return, as by the annexed writ I am commanded.

In testimony whereof I have hereunto set my hand and seal
168 this first day of September, 1871.

M. VAN VALKENBURGH, [L. S.]
County Judge.

The papers referred to in the body of the return as annexed, all appearing in the roll, are:

A. The same as that hereinafter set forth in from the 1st line of fol-184 to the 5th line of folio 186, inclusive;

B. The same as that hereinbefore set forth in from the last line of folio 46 to the 2nd line of fol. 51, inclusive;

C. The same as the copies judgment hereinbefore set forth in from the 1st line of folio 55 to the 15th line of fol. 65, inclusive; and

D. Containing the proofs in full that were taken before the county judge, in the proceeding; among such proofs there being a copy of the articles of association of the Cayuga Lake Railroad Company, filed July 1st, 1867, in the office of the secretary of state of the State
169 of New York, and duly certified by that officer, the body of the same being as follows:

Under and in pursuance of the requirements of the laws of the State of New York passed in the year 1850 (chap. 140), entitled "An act to authorize the formation of railroad corporations, and to regulate the same," and of the amendments thereof, and of other acts relating thereto, we, the undersigned, have associated ourselves together and formed a company for the purpose of constructing, maintaining, and operating a railroad for public use, in the conveyance of persons and property, as hereinafter stated; and we do hereby certify—

1st. That the name assumed to distinguish such association, and to be used in its dealings, is "The Cayuga Lake Railroad Company."

2nd. This association shall continue for 999 years, unless sooner dissolved.

3d. The said railroad is to be constructed from the New York Central Railroad to Ithaca, the length of said road to be 37 miles.

4th. The amount of the capital stock of said company shall be
170 one million dollars, which shall be divided into ten thousand shares of $100 each.

5th. John J. Thomas, Henry Wells, Edwin B. Morgan, Robert B. Howland, Albert Beardsley, David Anthony, Henry J. Geant, Henry D. Barto, Cyrus H. Davis, James A. Burr, Samuel Adams, Sam'l D. Willard, & Henry Chase shall be the first directors of said company, and shall manage its affairs for the first year and until others are chosen in their place.

In testimony whereof we have hereunto subscribed our names and specified our respective places of residents, and the number of shares of the capital stock of the association aforesaid taken and held by each of us respectively, this 18th day of June, 1867.

Subscribed to which are the names of 32 stock subscribers, with their respective places of residence & shares of stock taken, in all 377 shares, also the certificate of their acknowledgment of execution of said articles of association subjoined.

171 And to all these being the following verification attached:

STATE OF NEW YORK,
County of Cayuga, ss:

Henry Wells, John J. Thomas, and Edwin B. Morgan, being severally duly affirmed, each for himself, says that he is one of the directors of the Cayuga Lake Railroad Company named in the articles of association of said company which are hereto annexed; that the amount of stock required by section 2 of an act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850, has been, in good faith, subscribed, and ten per cent. paid in cash thereon to the directors of said railroad company; and that it is intended in good faith to construct, maintain, and operate the road mentioned in said articles of association.

(Signed) HENRY WELLS.
JNO. J. THOMAS.
EDWIN B. MORGAN.

Subscribed & affirmed before me this 18th day of June, 1867.
DAN'L ROBINSON, JR.,
Justice of the Peace, Cayuga Co.

172 Which all other necessary formal papers contained the roll concluded with the statement in due form of the orders and judgment of reversal of the said supreme court in general term, in and by which judgment it was and is by the said court in due form decided, determined, ordered, and adjudged that the aforesaid decision and judgment of the said county judge for appointing said commissioners and authorizing the creation and issuing of said bonds of the said Town of Lansing, as appearing by the said writ and the said return thereto, were manifestly erroneous, and the same, and all the proceedings had before the said county judge in relation thereto, were in all things reversed, annulled, and held for naught, it appearing by said roll that

said judgment of reversal was duly perfected and entered of record in the clerk's office of said Tompkins County, May 27th, 1872.

Defendants called Doctor TORBELL, who, being duly sworn, testified:

173 I was clerk of Tompkins Co. from Jan'y 1, 1871—six years—to Dec. 31, 1876.

The papers I hold in my hand contain the original petition in relation to this bonding—I knew at the time about it—and the different papers were filed at different times; some before I was clerk.

I judge from the outside that most of them were filed in 1870, but they were all put together.

This outside paper was filed March 21st, 1871; all put together then as they are now.

Judge Lyon (present county judge) was the attorney for the petitioners, and, I think, brought them to the office on 20 March, 1871. These papers were brought at the time the judgment of the county judge was brought there.

The outside filing, "March 21, 1871," is all that enables me to fix the date when the papers were brought.

The filing was by me.

The roll was here given and read in evidence by defendants' counsel as follows:

(Filed on the outside:) Tompkins County. The Cayuga Lake Railroad Company. Petition. Proceedings and judgment. Record in the matter of bonding the Town of Lansing in aid of the Cayuga
174 Lake Railroad. Lyon & Donnelly, attorneys for petitioners. Filed Tompkins County clerk's office, March 21, 1871, at 12 m. (Signed) D. Tarkell, clerk, Tompkins County, ss. Recorded March 21st, 1873, at 12 o'clock m., in liber No. 3, Miscellaneous Records, at page 99, and examined.

O. P. HYDE, *Dep'y Clerk.*

This roll contains the original petition of the petitioning tax-payers, consisting of several copies of the same petition, all alike, except signed, or purporting to be signed, by different petitioners, all making one petition, which is as follows:

To the Hon. W. Van Valkenburgh, county judge of Tompkins County:

The petition of the undersigned residents and others whose names appear upon the tax-list and assessment-roll of the Town of Lansing, in said county, as owners or representing certain taxable property in the corporate limits of said town, respectfully shows that the said petitioners desire that the said Town of Lansing shall create and issue its
175 bonds to the amount of seventy-five thousand dollars, and to invest the same, or the proceeds thereof, in the stock or bonds, or both, of the Cayuga Lake Railroad Co., in pursuance of an act of the legislature of the State of New York entitled "An act to amend an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations," &c., &c., passed May 18th, 1869. (Chap. 907, Laws of 1869.)

And in furtherance of the objects of said act we have hereunto signed our names, at the said Town of Lansing.

(Subscribed to which, on the several copies, are a large number of names as petitioners, and the name of James A. Burr among the rest, by whom the petition is verified.)

A copy of the affidavit of verification of the petition by the peti-

tioner Burr is the paper hereinbefore given in evidence on the part of the plaintiff, and appears at, from, and including the words "State of
New York," in folio 44, to and including the words "justice
176 of the peace," in folio 46, of this case.

This roll contains also the county judge's original order for publishing notice (a copy of which, marked B, is annexed to his return to the writ of certiorari), and is the same as the paper hereinbefore given in evidence by plaintiff, and appears at, from, and including the words "county of Tompkins," in folio 46, to and including the words and figures "Dec. 12, 1870," in folio 51.

Also contains the original notice, published with affidavit of its publication (a copy of which, marked C, is also referred to, and is annexed to the county judge's said return), being the same as the paper or papers hereinbefore given in evidence by plaintiff, and appears at, from, and including the words "State of New York," in fol. 51, to and including the words "Tompkins County judge," in folio 54.

And contains also the original judgment that was drawn up and caused to be entered of record by the county judge, in the bond-
177 ing proceeding in question (a copy of which, marked E, is annexed to his said return), being the same as the paper hereinbefore given in evidence by plaintiff, and appearing at, from, and including the words "county of Tompkins," in the first line of fol. 55, to & including the words "Tompkins County judge," in folio 65.

Witness continued:

These bonds were brought to the office the second or third week of November, 1871. There were no seals on opposite the names of these 3 men at that time. Mr. Cox, the attorney of the railroad company, brought them there at my office at that time. Mr. Lyon was there also, who had been the attorney of the R. R. co. There were 75 of these bonds there, and I registered them. I registered no seals; there were no seals there. I put on the county seal and certificate. That is the first time I remember meeting Mr. Cox or knowing he had anything to do with *with* it. Judge Lyon and Mr. Donnelly had been acting as counsel for the petitioners. Mr. Cox took the bonds away after they were registered that evening. The comm'rs were not there.

(Paper exhibited):

Q. Is that a copy of the registration, and does it appear that there were any seals?

178 (Plaintiff's counsel objected to this evidence as irrelevant and immaterial as the case stands. Objections overruled, and plaintiff's counsel excepted. The evidence was received.

Certified copy of registration here given in evidence, not showing any seals opposite the names of the commissioners; also that the date of the registration was Nov. 21st, 1871.)

This paper is in Mr. Cox's handwriting. We compared it with the original, and entered our copy from this. I made our registry in that way at the direction of Mr. Cox.

Cross-examined:

Question. When was your attention first called to the question of there being any seals on these papers?

A. I think I spoke of it a year or 18 months ago, at Syracuse.

Q. During the trial of the Springport case, was it not?

A. Can't tell. There had been 3 or 4 of the cases tried.

Q. It was after you had heard the matter of seals mooted in the Springport case, was it not?

said judgment of reversal was duly perfected and entered of record in the clerk's office of said Tompkins County, May 27th, 1872.

Defendants called Doctor TORBELL, who, being duly sworn, testified:

173 I was clerk of Tompkins Co. from Jan'y 1, 1871—six years—to Dec. 31, 1876.

The papers I hold in my hand contain the original petition in relation to this bonding—I knew at the time about it—and the different papers were filed at different times; some before I was clerk.

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175 bonds to the amount of seventy-five thousand dollars, and to invest the same, or the proceeds thereof, in the stock or bonds, or both, of the Cayuga Lake Railroad Co., in pursuance of an act of the legislature of the State of New York entitled "An act to amend an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations," &c., &c., passed May 18th, 1869. (Chap. 907, Laws of 1869.)

And in furtherance of the objects of said act we have hereunto signed our names, at the said Town of Lansing.

(Subscribed to which, on the several copies, are a large number of names as petitioners, and the name of James A. Burr among the rest, by whom the petition is verified.)

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And contains also the original judgment that was drawn up and caused to be entered of record by the county judge, in the bond-
177 ing proceeding in question (a copy of which, marked E, is annexed to his said return), being the same as the paper hereinbefore given in evidence by plaintiff, and appearing at, from, and including the words "county of Tompkins," in the first line of fol. 55, to & including the words "Tompkins County judge," in folio 65.

Witness continued:

These bonds were brought to the office the second or third week of November, 1871. There were no seals on opposite the names of these 3 men at that time. Mr. Cox, the attorney of the railroad company, brought them there at my office at that time. Mr. Lyon was there also, who had been the attorney of the R. R. co. There were 75 of these bonds there, and I registered them. I registered no seals; there were no seals there. I put on the county seal and certificate. That is the first time I remember meeting Mr. Cox or knowing he had anything to do with *with* it. Judge Lyon and Mr. Donnelly had been acting as counsel for the petitioners. Mr. Cox took the bonds away after they were registered that evening. The comm'rs were not there.

(Paper exhibited):

Q. Is that a copy of the registration, and does it appear that there were any seals?

178 (Plaintiff's counsel objected to this evidence as irrelevant and immaterial as the case stands. Objections overruled, and plaintiff's counsel excepted. The evidence was received.

Certified copy of registration here given in evidence, not showing any seals opposite the names of the commissioners; also that the date of the registration was Nov. 21st, 1871.)

This paper is in Mr. Cox's handwriting. We compared it with the original, and entered our copy from this. I made our registry in that way at the direction of Mr. Cox.

Cross-examined:

Question. When was your attention first called to the question of there being any seals on these papers?

A. I think I spoke of it a year or 18 months ago, at Syracuse.

Q. During the trial of the Springport case, was it not?

A. Can't tell. There had been 3 or 4 of the cases tried.

Q. It was after you had heard the matter of seals mooted in the Springport case, was it not?

A. I don't know.

179 Q. You have not seen either of those bonds since they were in your office in Nov. 1871, until to-day, have you?

A. No, sir.

Q. Was your attention turned in any respect at the time they were there to be registered to the question of whether any seals were on them or not?

A. I don't think it was. There were several questions came up in regard to the bonds; I know we talked freely about it.

Q. And that paper was made that you might have an accurate description of the bonds to put in the book?

A. Yes, sir.

Q. The first time that it ever occurred to you about the seals was about a year and a half ago?

A. I think it was.

Q. After these suits had been instituted?

A. Yes, sir.

Q. Your attention never called to it before?

A. I don't think it was; I don't know whether we talked about it that night or not.

Q. Are you able to say that your attention was ever called to these little seals previous to 18 months ago?

180 A. I think it was about that time that I called Mr. Goodrich's attention to it there at Syracuse or at Albany.

Q. Did you examine this paper (you produced) with reference to seeing whether there were any seals on it?

A. We compared them very carefully with that paper.

Q. Compared the numbers?

A. We compared the whole thing, all the way through very carefully.

Q. Did *we* read all the bonds over?

A. No; we read one of them.

Q. And nothing said about any seals?

A. I think you read (L. S.) where the seal appears on the original bond—the county seal.

Q. Nothing said about any seals after the comm'rs' names?

A. No, sir; I think there were no seals read after the commissioners' names. If there had been any seals we would have had one on that paper.

Q. That is a matter of inference and reasoning, but have you any recollection?

A. We always read the seal; I would not say that I recollect in regard to it more than to say if there had been one we would have put it upon the paper.

181 Defendants called DARIUS HALL, who, being duly sworn, testified:

I reside in Lansing, and am one of the R. R. comm'rs who issued these bonds under the proceedings before Judge Van Valkenburgh; took part in filling the bonds & coupons; I signed 25 of them, one-third, at my house in Lansing; I took them from Judge Lyons's office in Ithaca; think Mr. Clark brought them there; I understood they came from the railroad co.

Question. So far as you know, did the comm'rs set up the form of the bonds and produce them to be signed?

(Plaintiff objected to this evidence that it was immaterial and irrelevant.

The objection was overruled and the plaintiff excepted.)

Answer. The comm'rs did not get up the form of the bonds, as I understood it; it was gotten up by the railroad company. I knew Mr. Lyon was favorable to the construction of the road, & believe he acted as attorney for the company. When I got my 25 bonds the other comm'rs were present. I examined the bonds; the seals opposite the names of the comm'rs were never put on by me nor by any
182 comm'rs in my presence, and were not on when they were signed. I have never given any directions about putting them on.

Q. Did you see any of the directors of the railroad company or its att'ys shortly prior to your conclusion to issue these bonds?

(Plaintiff objected that this was "res inter alias actae" and incompetent. Objection overruled and plaintiff excepted.)

A. Mr. Delafield and Mr. Cox were there together.

Q. State what occurred in relation to your taking that bond of indemnity.

(Plaintiff objected as irrelevant and inadmissable. Objection overruled and plaintiff excepted.)

Ans. This (exhibiting a paper) is the bond of indemnity that was exhibited there drawn by Judge Lyon. I do not think that Mr. Cox or Mr. Delafield was present when this was exhibited.

Q. Any conversation about that or about the certiorari?

A. There was; I knew that a certiorari had been issued.

Q. Did Mr. Delafield know it; and what was the conversation?
183 (Plaintiff objected as inadmissible for any purpose. Objection overruled and plaintiff excepted.)

A. Mr. Cox and Mr. Delafield urged the comm'rs very strongly to issue the bonds, and we conversed all together. Ca'nt remember much of the language. I recollect asking, "Suppose we issue these bonds, under the present condition of things, after this certiorari, in what condition would that leave the town?" And the reply was it would leave the town in exactly the same condition as if there had been nothing done. One or the other of them stated that. It was before we issued the bonds.

Q. Anything further?

A. It was rumored that there was a design by the railroad co. to construct their railroad from Cayuga to Aurora and then stop, to get the money out of the town and then stop at Aurora, after constructing it to that point, and we were not willing to issue these bonds without a guaranty that the money that was paid by the town should be expended within the town.

They proposed, in this conversation, to give a bond of in-
184 demnity that that money should be expended within the town, and volunteered to indemnify the commissioners.

This is the paper (producing it).

Defendants offer the paper in evidence.

(Plaintiff objects for irrelevancy and immateriality. Overruled and plaintiff excepts); and the paper read in evidence as follows:

The same was read in evidence by defendant's counsel a' follows:

Know all men by these presents, that the Cayuga Lake Railroad Company is held and firmly bound to Darius Hall, John T. Knettles, and Alonzo H. Clark in the sum of one hundred and fifty thousand dollars to be paid to the said Darius Hall, John T. Knettles, and Alonzo H. Clark, or to their certain attorney, executors, administrators or assigns:

For which payment, will and truly to be made, the said The Cayuga

Lake Railroad Company doth hereby bind itself, its successors in office and assigns, firmly by these presents. Sealed this 31st day of August, in the year eighteen hundred and seventy-one (1871).

185 Whereas the above-named Darius Hall, John T. Knettles, and Alonzo H. Clark have been duly appointed and commissioned by the county judge of Tompkins County as commissioners for the town of Lansing, Tompkins County, for the purpose of issuing the bonds of said town to the amount of seventy-five thousand dollars ($75,000), in aid of the said The Cayuga Lake Railroad Company, and for other purposes provided for in and by chapter nine hundred and seven (907) of the laws of New York for the year 1869;

And whereas said Darius Hall, John T. Knettles, and Alonzo H. Clark as commissioners as aforesaid have subscribed for seven hundred and fifty shares of the capital stock of the said The Cayuga Lake Railroad Company, and have agreed as such commissioners to pay therefor in the bonds of said town of Lansing, upon the request of the said railroad company or their attorney:

Now, therefore, the condition of this obligation is such that if the said Cayuga Lake Railroad Company shall or do well and truly

186 indemnify and save and keep forever lawless the said Darius Hall, John T. Knettles, and Alonzo H. Clark, their executors, administrators, heirs, or assigns, jointly and severally, from all personal responsibility, cost, damages, expenses, suits at law, or other legal proceedings, which may occur, or may be incurred, or suffered by reason of said Darius Hall, John T. Knettles, and Alonzo H. Clark acting as such commissioners in subscribing for said capital stock and issuing and delivering to the treasurer of said The Cayuga Lake Railroad Company the bond of said Town of Lansing, for said sum of seventy-five thousand dollars in payment and for said capital stock, and also if the said The Cayuga Lake Railroad Company shall forth' fully expend the proceeds of said bonds in the construction of their said railroad in the said town of Lansing and not elsewhere, then this obligation to be null and void; otherwise to be and remain of full force and virtue.

Under and according to a resolution of the board of directors of the Cayuga Lake Railroad Company, adopted this 5th day of

187 September, A. D. 1871.

L. S., THE CAYUGA LAKE RAILROAD COMPANY SEAL.	HENRY WELLS, *Pres't.* CHARLES H. ADAMS, *Sec'y.* TALLMADGE DELAFIELD, *Treas'r.*

[$37.50 revenue stamp. Cancelled Sept. 5th, '71. H. W.

The witness proceeded—Darius Hall:

We subscribed for the stock in Ithaca. Judge Lyon, in behalf of the R. R. Co., took our subscription. I handed my bonds over to Mr. Clark and young Mr. Delafield; they called at my house. I handed them to Clark, and he to Delafield; can't tell the date of the subscription for the stock of the R. R. Co. The bond of indemnity was executed before anything was done; then the subscription for the stock was made before we signed the bonds; I never saw the bonds again until now; the bonds were not registered at the time we signed them and handed them over. We had nothing to do with the registration.

188 Cross-examined:

Question. When was that railroad completed through the town of Lansing?

A. I don't remember.

Q. How many miles of it run through your town?

A. I don't know.

Q. Does it run the whole length of the eastern shore of Cayuga Lake?

A. Yes, sir; it has been in operation several years; don't know how many daily trains; it runs pretty regularly. It is about 40 miles long. Mr. Knettles was one of the commissioners. He died over two years ago. We all three signed the bonds. Each of us signed a third of the coupons.

Defendants recalled ALONZO H. CLARK, who further testified:

The certificates to the town of the railroad stock have always been in my possession; nothing has been realized from them. We subscribed for the stock Aug. 30th, 1871. Before the bonds were issued the matter of the certiorari was talked of between Mr. Delafield and Mr. Cox.

189 Question. What was said about it?

(Plaintiff objected that this evidence was incompetent to effect this plaintiff.)

The COURT (addressing plaintiff's counsel). Do you propose to offer any evidence to contradict the last witness upon this subject?

PLAINTIFF'S COUNSEL. We do not intend to offer any evidence upon the subject at all, claiming that it is entirely immaterial and irrelevant.

Defendants called AMON W. NETTLES, who, being duly sworn, testified:

I am the brother of John T. Knettles, deceased, who was one of the commissioners; I boarded with him at the time he signed the bonds; he had 25 of them. I was in the room when he signed them. I packed them up and delivered them to Mr. Clark, comm'r. Never saw them again. I examined them when my brother was signing them; there were no seals on them at that time. The other comm'rs had signed the body of the bonds. There were no seals on when I delivered them to Mr. Clark.

190 The witness being cross-examined, further testified:

My attention to the question of seals was first called about two years ago; my brother died in February, 1875.

My judgment is that my attention was first called to this subject since the death of my brother, but am not positive. Don't recollect of ever having any conversation with him upon the subject.

A question here arising as to what was actually tried and decided in the two actions of Bailey vs. The Town of Lansing and of Stewart vs. The same, before referred to as having been previously tried and decided by Judge Wallace—

By the COURT. Allow me to suggest whether you might not agree that the decision of these cases as reported be taken as a part of this record.

It was thereupon in open court stipulated by the counsel for the respective parties that the opinion of Judge Wallace in the two

191 cases referred to in the 13th of Blatchford's Reports, pages 425 to 428 inclusive, is to be taken as evidence in this case as to what was there in those cases litigated and decided.

The cases were, it is conceded, tried together and upon the same evidence, so far as applicable to each. A copy of said opinion in those

cases, marked A, is hereunto annexed as a part of this case, and the same was read in evidence.

Defendants' counsel here put in evidence and read the stipulation in these cases, which were marked Exhibit E and duly filed. (The same appears ante, fol. 42, 43, &c.)

Defendants' counsel offered in evidence the complaint and answer in the case of Bailey referred to.

Plaintiff's counsel objected, that this evidence is irrelevant for any purpose under the pleadings—an action between other parties.

By the COURT. It appearing in evidence that part of the coupons presented here were in issue and tried in the suit of Bailey, I must receive the pleadings in that case in evidence.

(Plaintiff's counsel excepted to this decision.)

The said pleadings were read in evidence substantially to the
192 effect as follows:

The same being entitled in the suit referred to of Manasseh Bailey vs. The Town of Lansing, brought in this court July 20th, 1872, to recover the amount of the 75 coupons from these same seventy-five $1,000-bonds here in question, which fell due July 1st, 1872.

On these the complaint or declaration counts, alleging the plaintiff (Bailey) to be the owner and holder for value.

The answer or plea sets up substantially the same defenses which are embrace' in the plea or answer here. (Ante, fols. 20 to 33.)

Defendants recalled Alonzo H. Clark, who further testified:

Q. What did Mr. Delafield say when you and he and the other comm'rs were present as to this certiorari, in case the judgment should be reversed?

(To this plaintiff's counsel objected as incompetent.

The objection was overruled and the evidence received.

193 Plaintiff's counsel excepted to the decision.)

Ans. The question was asked by D. Hall, comm'r, Supposing that the Supreme Court should reverse the county judge's judgment, what would be the effect? I think Mr. Delafield's reply was that the bonds would have to come back and take the stock back.

The witness being cross-examined, further testified:

Ques. Did you suppose Mr. Delafield was a lawyer?

A. No, sir; I knew he had been cashier of a bank.

Ques. Did you and Mr. Hall consult counsel on this question?

A. Afterwards we did. The next day we consulted Judge Boardman, of the supreme court, and Mr. Finch, of Ithaca, upon the subject of the certiorari before issuing the bonds.

Ques. Was your attention ever called to the little seals on these bonds before a year and a half or two years ago? Did you ever think of the subject?

Ans. I don't think I ever did until about the time this Stewart case was tried in Syracuse in December two years ago.

194 Ques. I want to know if, so far as you were concerned, the seals, if left off, were intentionally left off, or was it inadvertently?

Ans. Inadvertently. It was not intentionally; we did not know anything about it; never thought of it.

Defendants rested.

Plaintiff's counsel called TALLMADGE DELAFIELD, who, being duly sworn, testified:

I reside at Aurora, on the Cayuga Lake Railroad; was treasurer of

that company; had charge of the finances and of the bonds. I know nothing at all about the seals in question. I received these bonds from the comm'rs in October, 1871, and took them to New York and obtained a loan of $50,000 on them from Leonard, Sheldon & Foster, bankers, at No. 10 Wall street. That money was applied to the purposes of the railroad which we were constructing at that time. I think it was but a short time after they were taken to New York that Leonard, Sheldon & Foster sent them to be registered. That loan of $50,000 re-
195 mained about six months. The loan was then removed to Allen, Stephens & Co., bankers, of Pine street, New York, for the same amount.

They took the loan and the bonds off the hands of Leonard, Sheldon & Foster. Allen, Stephens & Co. held this loan and bonds from 4 to 6 months; they were offering them for sale; we had authorized them to sell, and they were for sale all the time they were there.

At the end of that time, Leonard, Sheldon & Foster made a loan on them and took them away from Allen, Stephens & Co.

(Depositions of Wm. Elliot and exhibits attached shown the witness.)

This paper is a note dated Nov. 26, 1872. This loan was transferred at that time from Leonard, Sheldon & Foster to Elliott, Collins & Co., bankers, of Philadelphia.

These gentlemen were at that time the bankers of the road in Philadelphia and wished to control the financial business of the road; they therefore offered to loan to the R. R. Co. the $50,000 on these bonds and take them up from Leonard, Sheldon & Foster, which they did.
196 This was Nov. 26th, 1872, that the loan was transferred to Elliott, Collins & Co., who held this loan until the final transaction in February, 1873, when they rendered an account of sale of the bonds Feb'y 8th, 1873.

The loan was paid and the balance placed to the credit of the R. R. Co. in their hands. This balance was $4,745.83, and was passed to the credit of the co. in the general account.

We drew upon it and used it up and a great deal more in the construction of the railroad.

This witness, being cross-examined, further testified:

Q. At the expiration of the loan of Leonard, Sheldon & Foster, did they return the bonds personally to you?

Ans. No, sir. I think I was not present when Mr. Leonard and his clerk were examined; I don't recollect being there.

Question. Do you say that you were not at that trial in the Bailey case when Mr. Leonard and his clerk were there, and when he there testified that the bonds at the expiration of the loan were returned to you personally?

197 (Plaintiff's counsel objected to this as inadmissable for any purpose so far as it assumes to state what Leonard testified to.

Court overruled the objection, and plaintiff's counsel excepted to the ruling.)

Ans. No, sir. I don't recollect any such thing as that.

Ques. Are you prepared to say that Leonard, Sheldon and Foster, or one of them, or their clerk, did not return and hand to you personally those bonds there in New York?

Ans. Yes, sir; they never came into my hands. I do not know whether Mr. Cox had them or not; I never had them in my possession again. I made these two notes of Nov. 26, 1872, in Philadelphia, I presume, or at my office in Aurora; I do not remember at which place;

Elliott, Collins & Co. furnished the blanks for the notes I should think, but whether at Philadelphia or at my office in Aurora, I don't recollect. My best impression is that these notes were signed at their office in Philadelphia.

I was there on financial business; the borrowing of this money was a part of my business.

198 No other person was with me there on the part of the R. R. Co. I was its principal financial agent. Did my business principally with the elder Mr. Elliott. My negotiations were in his office at his banking house. At that time the loan I negotiated for the R. R. Co. was $50,000. The conditions were they were to have these Lansing bonds as collateral security with the notes.

Ques. Were they not to hold these bonds as collateral also for any addition' amount that you should draw out?

Ans. No. They were collateral to these notes; I took measures to have the bonds transferred to them; think I gave them an order on Leonard, Sheldon and Foster for the bonds, at the time of negotiating the loan and giving these notes. That brought the bonds into the hands of Elliott, Collins & Co. All this business I did as financial agent and treas'r of the R. R. Co.

Ques. Did the R. R. Co. draw out the avails of these notes from Elliott, Collins & Co.?

Ans. Yes, sir; it was paid over to Leonard, Sheldon & Foster.

199 I gave a check to them for it, and the bonds were sent to Elliott, Collins & Co. The bonds remained with them, I think, some 3 or 4 months. I have no personal knowledge of the sale of these bonds. Never saw Mr. Stewart; don't know that there is any such man. I have never corresponded with him, nor he with me. Whatever occurred between them and him was entirely without my knowledge.

Ques. Did you get up the form of these bonds for the town, or take part in their preparation?

Ans. I think not; don't know who did; I say I took no part in it whatever; I never saw these bonds until after they were signed; I was not there when the bonds were brought into the town for the comm'rs' signatures, and I testify positively that I know nothing about getting them up; I remember signing that instrument (the bond to the comm'rs), and stamped it; I was acting for the R. R. Co.; don't know where it was done, and don't know the handwriting; I don't know Mr. Lyon's handwriting; he had something to do with the bonding pro-

200 ceedings; I was not an active party in those bonding proceedings; took very little part in it, if any; don't know that I took any at all; I have no recollection at all of what was said or done when this bond (to the comm'rs) was signed; I have no recollection of the transaction at all, nor who was present, nor how I came to sign it.

Q. What motive or reason was presented to you?

(Plaintiff's counsel objected to this as incompetent, and only encumbering the case. Objection overruled, and plaintiff' counsel excepted.)

Ans. As I recollect, the object was to save the comm'rs from any expense they might incur in case any trouble arose from the bonds; I don't recollect whether the certiorari was mentioned or not; I had heard about it; I do not recollect saying that in case the certiorari should be upheld by the supreme court, that the town would be left as it was, and the bonds come back; I have no recollection of it;

201 will not say that I did not; I recollect being present when the stock of the R. R. Co. was subscribed for by the comm'rs; do not remember where it was nor when; I have only a general recollection; the bonds were delivered to me in October, 1871, and by me to Leonard,

Sheldon & Foster within a very few days; the decision on the certiorari was of no interest to me nor to the company; I heard about the certiorari something; heard of the decision about it; cannot tell what; paid no attention to it; the bonds were not transferred back to me, nor to the company; they went to Elliott, Collins & Co.; so far as the company was concerned it was a straightforward transaction; there was no transfer around at all; no object in that; I don't recollect precisely the date when Leonard, Sheldon & Foster received them in October, 1871; it was after we gave this bond to the commissioners.

On his redirect examination he further testified:

(Memorandum presented.)

Ques. Mr. Clark stated on the stand that it was the 11th October that he transferred the bonds to you. Would that accord with your recollection?

202

Ans. Yes; it was about that time; if it was the 11th October that I got these bonds, they were in New York on the 12th, and if it was the 12th I received them, they were in New York on the 13th, because I took them immediately to New York.

Ques. As to your transactions with Elliott, Collins & Co., were these bonds and the loan both transferred to Elliott, Collins & Co.?

Ans. They were, and they paid Leonard, Sheldon & Foster.

Ques. About how much in money transactions did the R. R. Co. have with Elliott, Collins & Co. while building the road?

Ans. I should say from six hundred thousand to $800,000.

The evidence here closed, and the foregoing is all the testimony given in the case.

Thereupon counsel for defendants moved the court to direct a verdict for the defendant, on each of the grounds specified in the objection hereinbefore appearing to have been raised to the admission in evidence of the bonds and coupons in question, and of the other proofs offered by plaintiff, such grounds being here restated.

203

The direction was claimed particularly because—

1st. The tax-payers' petition on which the proceedings for the bonding in question was instituted and are based did not contain all the facts and matters made necessary to be contained therein by the statute to give to the county judge authority and jurisdiction, and because he did not have the authority and jurisdiction to entertain said proceedings and to give the decision and judgment here relied on by the plaintiff.

2d. Because by the issuing of the writ of certiorari, its service and the county judge's return thereto, as appears, those proceedings had already become arrested and stayed before it is claimed any of the bonds in question were made and executed by the so-called commissioners.

3rd. And by the judgment of the supreme court of the State in the action commenced by said writ those bonding proceedings, including the county judge's decision and judgment, were held and adjudged to be erroneous, and were reversed as altogether invalid and void; that judgment of the supreme court having been given, perfected, and entered of record in the clerk's office of Tompkins County long before any of these bonds or coupons are claimed to have been transferred to the plaintiff.

204

4th. The effect of the act of May 12th, 1871, of the State legislature, (chap. 925, of 1871) was to render the bonding proceedings in question, so far as occurring after that date, wholly void for want of any continuing statutory authority to uphold them.

5th. These bonds are also void from never having having been fully

made and execu'ed. Sealing by the commissioners, by affixing either
205 the corporate seal of the town or their own individual seals is made indispensable by express requirements of the statute; never having been sealed at all by the so-called commissioners, or by their direction or consent, the instruments have never been executed and are void.

6th. They are void to', and that upon their face, from being drawn in violation of express provisions of the statute under which they purport and are claimed to have been issued. Their being drawn all payable (as to principal) at one time—January 1st, 1902—is in violation of the 4th section of the act of 1869 as amended by the 6th section of the act of May 12, 1871, and being thus drawn payable more than 30 years from their date (October 1st, 1871) violates another positive requirement of the same section 4 of the act of 1869, both as originally enacted and as it still stands since the amendment of 1871 referred to.

7th. And further, because the plaintiff has failed to show that he is a bona fide holder for value of the bonds or coupons in question, but the contrary appears.

206 Plaintiff's counsel moved the court to direct a verdict for the plaintiff for the interest due on said bonds.

Plaintiff's counsel also moved the court to strike from the record all the evidence which had been presented by the defendant as to all the issues which had been before tried and adjudicated in the former case which had been pleaded and proved, including also the evidence about the seals on the bonds.

And thereupon the plaintiff's counsel duly presented and tendered the said eight packages of coupons which had been given in evidence.

But the court thereupon declined each of the said motions, requests, and propositions submitted by plaintiff's counsel severally, to which refusals and declining plaintiff's counsel in due time and form separately and severally excepted.

And thereupon the court stated at length its views and conclusions upon the case, and concluded by directing a verdict for the defendants, to which direction and ruling the plaintiff's counsel in due
207 time and form excepted.

A copy of which views and conclusions of the court *are* so stated is hereto annexed marked B, and is made a part of this case.

And thereupon the jury, in obedience to the order and direction of the court, rendered their verdict, and the same was then and there duly recorded for the defendants, to which the plaintiff's counsel excepted.

Thereupon an order was duly made and entered for sixty days' time to plaintiff to make and serve, with like time to defendants to propose amendments for this case, and with leave to turn the same into a bill of exceptions and for a stay of all proceedings on the verdict until after the hearing and decision of the motion for new trial.

Auburn, N. Y., July 21, 1877.

JA'S R. COX,
Pl'ff's Att'y.
M. GOODRICH.
Def'ts' Att'y.

208 *A.—Opinion of Wallace, J.* (13 *Blatchf.*, 428.)

United States circuit court northern district of New York.

MANNASSAH BAILEY
vs.
THE TOWN OF LANSING.

JOHN J. STEWARD
vs.
THE SAME.

Before Wallace, J., northern district of New York, June 20th, 1876.

WALLACE, J.

The suit by Bailey is brought upon interest coupons originally attached to bonds issued in aid of the Cayuga Lake Railroad Company, by commissioners appointed for that purpose by the county judge of Tompkins County under the provisions of the bonding acts of 1869, 1870, and 1871, of the State of New York. (Laws of 1869, p. 2303; laws of 1870, p. 2049; laws of 1871, p. 2115.)

These acts authorize the county judge, upon the presentation of a petition by a requisite number of the tax-payers of the county,
209 to ascertain by judicial inquiry if the majority of the tax-payers, in number and in taxable property, desire the town to issue its bonds in aid of the railroad, and if he ascertains such to be the case authorizes him to appoint three commissioners to execute and issue bonds in behalf of the town and invest them in the stock or bonds of the railroad company.

The county judge, having entertained the petition of the tax-payers and taken proofs, adjudged that the bonds should be issued, and appointed commissioners for the purpose.

Opposing tax-payers contested the proceedings and, pursuant to the statute, obtained a writ of certiorari for the reveiw of the decision of the county judge by the supreme court of the State. Upon review the supreme court reversed the judgment.

This reversal in legal effect vacated the entire proceedings taken before the county judge.

The certiorari was the common law writ.

After it was issued and notice thereof given to the commis-
210 sioners and before the commissioners had taken the oath of office required by law preliminarily to entering upon the duties of their trust, they executed and delivered the bonds to the railroad company, the latter having full notice of the certiorari and giving to the commissioners a bond of indemnity.

It does not appear how the plaintiff acquired title to the coupons in suit, but it does appear that they were in his possession before they fell due. It does not appear whether or not he ever owned the bonds to which the coupons were originally attached.

Upon the facts I do not think the plaintiff is entitled to recover.

The bonds were originally negotiated between the commissioners and the railroad company in violation of good faith. The parties to the transaction were aware that proceedings were pending to annul the authority of the commissioners to issue the bonds.

211 When the certiorari issued the judgment and the proceedings upon which it was founded were removed to the supreme court,

and the effect was that all proceedings under the judgment which had not actually been put in motion would be suspended.

The decisions in this State are uniform that upon the allowance of *of* a certiorari the effect of the judgment which it is taken to review, except in the single case of an execution already issued, and in the process of being executed, is suspended as to all proceedings under it, and to all collateral matters. The judgment is not even evidence in a case between the same parties. It is as completely suspended as though it had never been rendered.

(Lannitz v. Dixon, 5 Sondf. 249; Conover v. Devlin, 24 Barb. 636.)

Under these circumstances the commissioners were no more justified in attempting to issue bonds in behalf of the town than they would have been if their agency had been revoked, and the railroad
212 company having knowledge of the facts acquired no title to the bonds which they could enforce as against the town. The case is not analogous to that where property has been sold under an execution upon a judgment subsequently reversed.

I do not intend to intimate that if the bonds had been issued by the commissioners after the certiorari, and had come to the hands of an innocent purchaser, the latter would have acquired no title.

Although the authority of the commissioners to act as agents of the town was suspended, such a purchaser would acquire the rights of a bona fide holder of commercial paper, and could recover against the principal as though the authority once conferred upon the agent had never been revoked.

But in such case it would be incumbent upon the plaintiff to show that he had purchased innocently, relying upon the *au*stensible authority of the agent. (Coddington v. Boy, 20 Johns., 637.) These views lead to the conclusion that when it appeared that the bonds
213 were in fraud of the rights of the defendant the burden was cast upon the plaintiff to show that he was a purch'er in good faith and for value.

He could not rest upon the presumption derived from his possession of the coupons before they become due. (Rogers v. Morton, 12 Wend., 484; Smith v. Sac County, 11 Wall., 139.) Judgment is ordered for the defendant in the suit by Bailey.

STEWART
v.
LANSING.

The suit by Stewart differs from the one by Bailey in that it appears that the bonds were pledged as collateral in February, 1873, to Elliott, Collins & Co., of Philadelphia, and sold by them after consultation with the officers of the railroad company. Elliott, Collins and Company were holders for value and before maturity, and their sale to satisfy the pledge conveyed their title to the purchaser.

Whether the plaintiff was the purchaser from them directly or not is not clear, but, however this may be, he succeeds to all the rights of Elliott, Collins and Co., and occupies the position of a bona-fide purchaser.

214 As against a bona-fide holder of the coupons, none of the defenses interposed ar' tenable.

Most of these defenses are unavailing within the doctrine of Munson v. The Town of Lyons. (12 Blatchf., C. C. R., 539.) The petition upon which the county judge took cognizance of the proceedings for bonding the town was sufficient to call for the exercise of his judicial

judgment, and in an action on the bonds by a bona-fide holder this determination is conclusive.

It is urged that there was no organized railroad company in behalf of which the town could extend its aid, because the articles of association fail to state the counties through which it is to run, as required by the general railroad act under which it is organized, and specify only the termini of the road. I am utterly unable to appreciate the argument.

The road was actually organized, and if in the manner of its organization it failed to comply with such provisions of the statute,
215 this could only be taken advantage of by the sovereign power, and after its corporate existence has been recognized by two subsequent acts of the legislature it would, I think, be too late for the State to assail it.

It is also urged that the bonds when issued were not sealed.

I do not stop to enquire whether they were required to be sealed.

It suffices that there is no sufficient evidence to show that they were not.

The testimony of witnesses that they do not remember to have seen seals on the bonds when they were delivered, in the absence of any pretense even that their attention was directed to the circumstance whether the seals were on, is entirely insufficient to authorize the conclusion that the offense of forgery has been committed by any one.

It is also urged that the bonds controvene the statute under which they were issued, because not payable at the time required by it. The act of 1871 does not repeal section four of the act of 1869, but confers the right to issue bonds payable in less than thirty years, and
216 when thus issued they are subject to the condition therein imposed.

But the right to issue pursuant to the terms of the first act still exists, and the bonds in suit conform to the terms.

The reversal of the judgment of the county judge by the supreme court cannot invalidate the title of a bona-fide purchaser.

The bonds had been issued and put in circulation prior to the reversal.

The judgment was effectual when they were put in circulation.

After they were given currency no decision of the court could strip them of their negotiable character.

Jugment is ordered for Stewart.

JAMES R. COX,
For the Plaintiff.
MILO GOODRICH,
For the Defendant.

And because none of these things except the order last aforesaid appears of record on this 13th day of September, this bill of exceptions is settled, and signed, and directed to be filed and to be
217 come a part of the record.

HON. W. H. WHEELER.

Views and conclusions of the court.—B.

STEWART *vs.* LANSING.

WHEELER, *J.:*

The COURT. To restate the facts in order of time, the petition of the

tax-payers of the town of Lansing to the county judge to commence proceedings for the bonding of the town was presented to the county judge December 10, 1870.

The judgment of the county judge on that petition was entered March 27, 1871.

The writ of certiorari from the supreme court was issued to the county judge and filed in the county clerk's office March 27th, 1871.

Stock in the railroad corporation was subscribed for by the commissioners, assuming to act for the town, Aug. 1871. The bonds of the town were issued in payment for the stock in Oct. 1871, and were pledged by the R. R. co. to Leonard, Sheldon & Foster, who held
218 them on the 7th day of May, 1872.

The judgment of the county judge was reversed on the certiorari proceedings May 7th, 1872, and the judgment entered in the clerk's office May 22nd, 1872; Leonard, Sheldon & Foster held the town bonds until after that time.

Then on the 26th day of November, 1872, on the order of Mr. Delafield, the treas'r and financial agent of the R. R. co., the bonds were transferred to Elliott, Collins & Co., to be held by them as collateral security for the note of the R. R. co. executed and delivered by Delafield to Elliott, Collins & Co.

It is to be noticed that these bonds are not to be issued by the town itself, or any officers of the town, and they do not purport to be issued by the town or by any officers of the town, but they are issued by commissioners appointed by the county judge, and purport to be issued only by the commissioners.

219 The bonds derived no validity nor no apparent validity from any act of the town itself or any of its officers, but solely from the act of the commissioners appointed by the county judge, whose authority to act rested wholly on his adjudication on the petition under the statute.

This is different from cases where a party puts his own negotiable paper on the market with an apparent but without any real validity.

There the act of putting the paper on the market is his act.

Here it is not the act of a town.

There, if innocent persons are deceived by the issuing of the paper into purchasing it on account of its apparent validity, that is the result of his fault.

Here, if such result follows, it is not the fault of the town.

There he puts his own bad paper on the market.

Here somebody else has put the town paper on the market, and if the town paper is bad, somebody else is guilty of the wrong in putting it forth.

220 There the paper is at least genuine.

Here, unless the paper is authorized by the law and the proceedings under it, it is spurious.

If one man issue the paper of another that purports to be so issued by him for another, that is not genuine paper unless the agent assuming to issue it had authority.

It is not shown to be apparently genuine paper by showing simply that the signatures of the agents is genuine.

To make it apparently genuine paper the signature of the agent must be genuine, and his authority must be apparent.

Here, although the signatures of the commissioners were genuine, the paper they issued was not the genuine paper of the town unless they had authority to issue the paper as the paper of the town.

So the apparent validity of this paper depends upon whether the commissioners had authority, in fact, to issue the paper.

If they had such authority, then, their signatures being genu-
221 ine, the paper apparently was genuine paper.

If they lacked such authority, then the paper was not genuine, although their signatures were genuine.

In this case the petitions to the county judge lacked the essential allegations that the petitioners were a majority of the tax-payers of the town, representing the majority of the taxable property of the town.

Which allegations were required by the statute to be inserted, and the truth of which was the very thing to be adjudicated upon by the county judge.

The statute required him to try the truth of the petition.

In trying the truth of these petitions he would not try what the law required to be tried.

Notice of the trial on these petitions would not be notice to those interested in such a trial, as the law required to be had.

In fact, he went beyond the petition & tried the questions that the law required to be tried, but he hadn't the allegation in the petitions as the foundation for such a trial.

222 And those that were notified by the pendancy of the petition were not notified by the notice in the petitions that such a trial as was had would be had.

These proceedings lacked essential foundation and were unauthorized and invalid, and were so adjudged by proper tribunal on the certiorari proceedings.

That decision was apparently right, but whether right or wrong it was the decision of the tribunal authorized by the law of the State to make it, and having been left to stand it stands as a conclusive adjudication that the proceedings were invalid, and that the commissioners had no authority, under the proceedings, to issue the bonds of the town.

And this would lead to the conclusion that the bonds were unauthorized and void as against the town everywhere. But if this is not true so far as the bonds were void against the town everywhere, Delafield, as agent of the R. R. co., knew of the certiorari proceed-
223 ings when he took the bonds, and he so took the bonds and, with notice of whatever might be the result of those proceedings, knew that the proceedings had been taken and were pending.

He purchased in behalf of the R. R., took them in behalf of the railroad, and the R. R. having purchased them subject to his knowledge, in that respect did not stand as an innocent purchaser. Elliott, Collins and Co. got their title from the R. R. co. in November, 1872.

They actually received the bonds from Leonard, Sheldon & Foster, but they received the bonds on the order of Delafield, as treasurer and financial agent of the R. R. co., to secure notes that he executed to them for the money which they advanced on these notes to the R. R. co. to the amount of $50,000.00.

The money they advanced was the money of the R. R. co. The notes they received & discounted were the notes of the R. R. co.

The bonds, when they received them, was received as collateral for the notes of the R. R. co., and they received them on the order of Delafield, as agent of the R. R. So that in fact and in effect they received the bonds of the R. R. co.

224 This was in November, 1872.

When they bought the bonds the whole proceedings of the

county judge had been reversed on the writ of certiorari, and the judgment of reversal had been entered long before.

The effect of the writ of certiorari when issued was to certify up the proceedings of the county judge to the supreme court, and after the writ had issued the record of the county judge will show that the proceedings had been certified to the supreme court for adjudication on the certiorari, and all that had been done before the commissioners had issued or assumed to issue the bonds of the town.

Those proceedings were pending in the supreme court until the time of the judgment quashing the proceedings of the county judge; after that judgment quashing the proceedings of the county judge the record of the county judge showed his proceedings to have been quashed, reversed, and set aside, so that they amounted to nothing.

225 After that there was no such proceeding standing there; they were gone.

These bonds on their face refer to the law of 1869 as the law under whose authority they were issued.

The bonds themselves state that they were issued under the authority of the law of 1869.

A purchaser of the bonds, if he looked at them—and he was bound to look at them—would learn from the bonds themselves that they were issued under that law.

The bonds referred him to that law, and the exercise of due diligence would have sent him to the examination of the law. If he had exercised that diligence and examined the law, the law would have referred him to the record of the proceedings of the county judge as the foundation of the authority of the commissioners to issue the bonds.

If he had followed the direction pointed out by the law and examined the record of the proceedings of the county judge, he would have found that they had been quashed and were of no validity or force whatever.

226 Therefore, by the exercise of that due diligence which the law requires every purchaser of negotiable paper to exercise, they would have examined the bonds and been referred to the law, and would have examined the law and been referred to the record, and would have examined the record and would have found that there was no authority for the issuing of the bonds.

The foundation of the proceedings to bond the town is the expression of the desire of a majority in number & amount of property of the tax-payers of the proper petitions to the county judge, and his adjudication upon such a petition that it is the petition of the majority, both in number and amount, as the evidence of the expression of such a desire by such a majority.

It is the majority of the tax-payers, both in number and amount, that is the moving force in the bonding of a town. The object of this statute apparently was that there should be a settlement of the

227 question whether there was such an expression of such a desire by such a majority, before a known tribunal, and at a known place where the proceedings would be recorded in the public records, and where all that were interested could enquire in respect to it and could ascertain fully and absolutely in regard to it.

The meaning of the law was that the records of the county judge should contain the evidence, and the only evidence, and the conclusive evidence, if there was such evidence, of the majority of the tax-payers of the town had in the method pointed out by the statute expressed a

desire that the town should be bonded, and that the proceedings had been so carried forward in accordance with the law; that their wishes should be carried out by the appointment of the county judge of the commissioners to act under the law to subscribe for the R. R. stock and issue the bonds of the town.

The whole purpose of the statute seems to have been to point to the records of the county judge as the place where all persons interested or desiring to deal in these securities could go and there learn definitely whether there any authority for issuing the bonds, and whether there was any validity to the bonds if they were issued.

228

The town had a right to suppose that all persons who were interested would go there to look.

As soon as the adjudication had been made, and there was time to commence such proceedings, the town commenced the certiorari proceedings to set aside the adjudication of the county judge.

They began within 7 days.

The writ had actually issued, and had commanded the county judge to certify up the record long before the commissioners had begun to issue any town bonds.

When they did issue them they issued them by the procurement of the R. R. co., which, through its officers, had that full knowledge of the pendency of these proceedings.

The' took the bonds subject to the exigency of the certiorari proceedings, and Elliott, Collins and Co. took the bonds of them after the termination of the certiorari proceedings in the setting aside and reversal of the judgment that was the very foundation of the bonds.

229

It is urged that the commissioners had authority—apparent authority—to go forward and issue these bonds when they did issue them, because then the proceedings of the county judge had not been reversed.

And it is urged that if they had authority to go forward and issue them, no subsequent proceedings which resulted in a reversal of the adjudication of the county judge would affect the validity of the bonds.

If that were so, the reversal of a judgment of the county judge or certiorari would be wholly useless in every case, because some time must elapse after the issuing of the writ, which could not issue until after the adjudication of the county judge and the judgment either sustaining or setting aside the proceedings on the certiorari, and if in that interval the commissioners could issue bonds that would bind the town beyond any effect of the certiorari proceedings, such proceedings would be wholly useless.

230

It is evident that the statute was made in view of the fact that the proceedings of the county judge could be set aside on certiorari under the existing statute, because the statute of 1871 expressly regulates such proceedings, and refers to them as proceedings that were authorized by law before that time, and not as proceedings there authorized by law for the first time, and seems to have contemplated them as proceedings that before that time might be had to set aside the judgment of a county judge.

So it is considered that the certiorari were proper proceedings to set them aside—the proceedings of the county judge; that they were had in due time and in due course, and resulted in setting aside those proceedings, and that result was accomplished before Elliott, Collins & Co. got title to the bonds. The plaintiff got

231 his title from Elliott, Collins & Co., and had no better title to the bonds, so far as disclosed, than they had, so that there was no authority to issue the bonds by the commissioners.

The whole foundation upon which they acted was set aside. If the plaintiff before he purchased the bonds had looked at them, they would have referred him to the law of 1869, which would have referred him to the record, which would have shown him that there was no proceeding which authorized the appointment of any commissioners to issue the bonds, and would have shown him that the bonds were wholly invalid. So the plaintiff did not have and did not acquire any right to recover of the town on these bonds by the purchase of the bonds.

But it has been shown in evidence that the plaintiff brought suit on some of the coupons attached to some of these bonds, and that one Baily brought suit on some other coupons attached to these bonds, and that the plaintiff recovered judgment on the coupons that
232 he held, and that Bailey failed to recover judgment, and judgment was recovered by the town as against him on the bonds that he held.

It is urged on the part of the plaintiff that that judgment in his favor on those coupons is conclusive here now of his right to recover on the bonds as valid instruments for the payment of the interest represented by the coupons that he now holds, and the claims to hold in that right of recovery the coupons on the bonds that Bailey held at the time the judgment in his suit was rendered.

It is quite clear that no recovery can now be had on the coupons which Bailey held when judgment was rendered against him on them in his suit, for that was on adjudication against the validity of the coupons themselves, and that extinguished any right of action afterwards on them.

But, however that may be, the plaintiff does not claim to recover again on the coupons he recovered on before.

233 The judgment on these coupons is a valid judgment. If that has not been satisfied he is entitled to satisfaction of it.

The question as to his right to recover on those coupons is not open here, and would not be anywhere, except in a regular proceeding to effect that judgment. The point is whether that judgment is in itself conclusive evidence of the right to recover on the other bonds and the other coupons, aside from those coupons and the Bailey coupons.

There would be a separate cause of action on each bond and on each coupon. Every bond in itself contains an express promise to pay the amount of the bond, and the interest as specified in the coupon upon presentation of the coupon.

Every coupon by itself contains an express promise to pay the same specified in that coupon as interest on the bond; that so there is a distinct promise in each bond and each coupon, and each bond and
234 coupon if valid would contain and support a cause of action. It would be a good and valid cause of action.

The former judgment did not profess to and does not in fact appear, to have determined anything but the right of action on the coupons there sued upon. The recital in the judgment is of a right of recovery on the coupons.

The judgment itself is for the sum of money that the coupons amount to. Those coupons are not in suit now; those in suit now and those bonds in suit now were not in suit then. The judgment might be one way as to one or some of the coupons, and be a contrary way as to the rest of the coupons or the bonds.

So the adjudication on one or some of them would not necessarily be an adjudication as to the rest, and such an adjudication not being necessary to be had in adjudicating upon these, the decision would not be conclusive as to the rest unless the validity of the rest was in fact involved in the decision on those and the validity of the rest. Actually decided upon in the decision on those and this appears in the de-
235 cision referred to in the Law Times reports made by the Supreme Court of the U. S. last winter.

It does not appear from the evidence, or from the judgment itself, in the other case that these bonds or these coupons were actually adjudicated upon in that case.

It does not appear that the plaintiff then owned the bonds and coupons that he now owns.

So that the court in trying this case then would not have any jurisdiction to try the case presented now.

His situation as to the bonds and coupons in suit now may be very different as to his situation as to the same bonds and coupons then, and it does not appear from the evidence but that it is very different. So that according to the rules as to the conclusiveness of judgments the former adjudication as to the other coupons does not settle as between these parties the right of recovery on these bonds and coupons.

The right of the plaintiff to recover now is to be determined independently of the decision in the former case.

236 Then, as to the seals or want of seals on these bonds.

The law required the commissioners to affix to the bonds the seal of the town, if the town as a corporation had such a seal; if not, the seals of the commissioners.

All the witnesses who profess to know anything about it agree that there were no seals affixed to these bonds at the time they were issued by the town, neither any seal of the town nor any seal of the commissioners.

The law under which the bonds were issued expressly required the signing and sealing of the bonds.

It is urged that if the bonds were issued signed, that would give authority to affix the seals. So that the holders of the bonds would be entitled to affix the seals the same as an endorser in blank of an
237 note has authority to fill up the endorsement, or the taker of a bill having a blank has authority to fill in the necessary words. But the law seems to contemplate the signing and sealing of the bonds as part of the necessary execution of the bonds.

The one is required as much as the other, and no reason is apparent why if the bonds were issued signed, and not sealed, *why* the party would not have authority to put on seals any more than if they were issued sealed, and not signed, the party holding them would have authority to sign them.

It might be that the bonds would have some validity as contracts without any seals, if they were issued as signed, to bind either the town for whom the commissioners professed to act or the commissioners themselves personally. If there was any such validity to these bond' when they were issued, and they were afterwards altered by the person holding them by putting on the seals, the seals would alter the obligations of the bonds.

The instrument would be of a different character; a different
238 statute of limitation might apply.

The obligation of the maker would be different.

Such an alteration done purposely by a holder would destroy the val-

idity of the instrument altogether. Of course if done by a child or a stranger it would only amount to a disfiguration or a mutilation, the same as accident'ly to spill a drop of ink on them, or to spit upon them, or in any other way to deface them; but if done by a holder designedly it might amount to a forgery, and, if so, would destroy whatever of validity the bonds had before that time.

It may be that there is some evidence that would go to show that these bonds were sealed when issued.

Certainly there is a great deal of evidence to show they were not. But, however that may be, it is considered here now, upon such examination of the evidence and of the statute as can now be had, that the bonds, whether sealed or not, had no validity as against the
239 town, and therefore that there is no ground on which the plaintiff can recover.

If that were not so, then perhaps it would be necessary to submit to the jury a question as to whether the bonds were sealed or not at the time they were issued.

But it is considered that, the question aside from the seals, there is no ground on which the plaintiff can recover in this suit.

Therefore a verdict is directed for the defendant.

240 (Endorsed:) U. S. circuit court, north. dist. of New York. Stewart vs. Town of Lansing. Case. Filed Sept. 21, 1878.

241 United States circuit court, northern district of New York, June term, 1878.

JOHN J. STEWART
vs.
TOWN OF LANSING.

This cause has been heard on the motion of the plaintiff for a new trial, after verdict for the defendant, directed by the court at June term, 1877.

The action is brought upon interest coupons originally attached to bonds issued in behalf of the defendant town to the Cayuga Lake Railroad Company. The defendant denies that the bonds were ever lawfully issued in its behalf, that they or the coupons were ever binding upon it, and that the plaintiff is in any way entitled to recover upon the coupons. The laws of the State of New York, chap. 907, 1869, provided that whenever a majority of the tax-payers, representing the majority of the taxable property, of a municipal corporation, which the defendant is, should make application to the county judge, by petition, setting forth that they were such majority, and desired that the corporation should create and issue its bonds and invest the same in the stock or bonds of a railroad company in the State, it should be
242 the duty of the judge to give notice of a time and place for taking proof of the facts set forth in the petition as to the number of tax-payers joining in it and the amount of property represented by them, and at that time and place to take such proof; and if it should appear satisfactorily to him that the petitioners, or they and such other tax-payers as should appear and join with them, were such majority, to so adjudge and determine, and cause to be entered of record; that such judgment and the record thereof should have the same force and effect as other judgments and records of courts of record in the State; and that if he should so adjudge, he should appoint three commissioners to issue the bonds of the municipal corporation, which should be due in

thirty years, and exchange them for the stock or bonds of the railroad company.

Application was made by tax-payers of the defendant, by petition, not alleging, however, that they were such majority, on which the county judge adjudged and determined that they were such majority, and entered the judgment of record.

Afterwards, by chap. 925 of the laws of the State, passed May
243 12th, 1871, it was provided that review of such proceedings should be by certiorari, on the return of which the court out of which it issued should review all questions of law and fact determined by the county judge, and might reverse, affirm, or modify his determination.

A writ of certiorari to review this judgment issued to the county judge May 27th, 1871.

In August, 1871, the commissioners appointed by the county judge under the judgment pursuant to the statute, being personally indemnified by the railroad company against the consequences of the certiorari which had been served upon them, and of which the officers of the railroad company were informed, issued the bonds, dated forward to October 1st, 1871, to be due January 1st, 1902, with interest coupons attached, due semi-annually. On the face of the bonds it was stated that they were issued by virtue of the law of 1869, and that it authorized the town to issue the bonds. The county judge made return to the writ of certiorari September 1st, 1871.

On the 13th day of October, 1871, the railroad company pledged the bonds to Leonard, Sheldon & Foster, bankers, to secure payment of a loan of fifty thousand dollars.

244 Final judgment was rendered on the certiorari by the court that issued the writ that the judgment of the county judge was manifestly erroneous, and that the same and all proceedings before him in relation thereto were in all things reversed, annulled, and held for naught. This judgment was entered in the office of the county judge May 27th, 1872.

The railroad company, on the 26th day of November, 1872, procured Elliot, Collins & Co., bankers, to make a loan on the pledge of these bonds, and drew on them against the loan to pay Leonard, Sheldon & Foster, and gave them an order on the latter firm for the bonds, on which they received the bonds. The bonds afterwards passed again to Leonard, Sheldon & Foster, and some of the coupons to the plaintiff.

The plaintiff brought suit on some of his coupons in this court, on which he obtained final judgment in his favor at the June term, 1876. The case is reported, 13 Blatch., 425.

The plaintiff now claims that the judgment in his favor in that suit on those coupons conclusively establishes his right to recover in this suit on these coupons; and, if not, that he is entitled to recover on the facts
245 proved otherwise. The defendant denies the correctness of each of these propositions. Each coupon in the former suit constituted, and was declared upon as, a distinct cause of action, and so of those in this suit. The judgment in that suit conclusively settled in favor of the plaintiff everything involved in that controversy necessary to the right of recovery upon those coupons. This is elementary. It also conclusively settled every fact properly put in issue there, and tried and determined as to all other controversies between the parties in respect to the subject to which the facts pertained, and nothing more, outside of the causes of action there directly involved. It did not settle that the plaintiff could recover on other coupons like those because he did on those, nor that he had the right to have all similar

suits decided in the same way. The judgment of the court became entitled to weight as an authority, on account of the eminence, learning, and ability of the court on all similar questions between any parties. It became conclusive between the parties to it as to every part of the causes of action tried, whether actually tried or not, and as to all facts relating to other causes of action actually tried and deter-
246 mined, because the law requires that such matters, once tried and determined between parties, shall forever be at rest between the same parties.

The distinction between the conclusiveness of a judgment in respect to everything that might have been brought into the suit in which it is rendered, whether actually brought in or not, and only in respect to the things actually involved, and brought in and determined in other suits, is well and very clearly pointed out by Lord Ellenborough, Ch. J., in Outram vs. Morewood (3 East., 346); Putnam, J., in Arnold vs. Arnold (17 Pick., 4); and Mr. Justice Field, in Cromwell vs. County of Sac (94 U. S., 351), and in Davis vs. Brown (ibid., 423.)

The issuing these bonds and coupons, the title to them afterwards while they were kept together, and to the coupons then in suit afterwards, were in issue in the former suit, and the facts concerning them were all determined in favor of the right of the plaintiff to judgment in that suit.

There was also involved, tried, and determined, as between these parties, that the bonds were originally negotiated between the com-
247 missioners and the railroad company in violation of good faith; that Elliott, Collins & Co. were holders of the bonds, for value, before maturity, in February, 1873, including the coupons, and that they sold them under their right.

These facts must be taken to be conclusively settled in this case, but when so taken they do not alone conclusively settle that the plaintiff is entitled to recover. If upon these facts, in connection with the undisputed facts otherwise appearing on which his evidence tends to prove, he would be entitled to recover, then the direction of a verdict for the defendant was wrong, and a new trial should be granted; otherwise not.

This makes it necessary to examine further into the merits of the case.

It is understood that the town had not, and is not claimed that it had, any power to issue these bonds independantly of that conferred by the legislation mentioned. Under the constitution of the State probably the legislature had power to place the burden of maintaining a railroad or a part of it upon the towns, and to authorize the county judge to appoint agents for them to perform the duty, and to procure means for that purpose by giving obligations of the town. (Duanesburgh vs. Jenkins, 57 N. Y., 177.) But the legislature has not done so in this case.

248 It has made the authority of the judge to appoint the agents dependant upon the application of the majority of the tax-payers in number and property, found by judgment to be such, on a petition alleging that they are such. The foundation of the authority to appoint, and of the agents when appointed, is the judgment. The town has no corporate authority to act in the matter otherwise. Without the judgment there could be no agent that could bind the town at all, and probably no one would claim but that if the judge should assume to appoint without there being such a judgment, or commissioners should assume to act without any appointment, and bonds should be executed in

behalf of a town, they would be merely void and of no validity, even in the hands of a bona-fide purchaser for value. (Mechanics' Bank vs. N. Y. & N. H. R. R. Co., 3 Kern., 599; E. Oakland vs. Skinner, 94 U. S., 255; McClure vs. Oxford, ibid., 429.) So all liability upon these bonds to any holder anywhere must rest upon the judgment of the county judge. Doubtless the petitions were sufficient to call for the exercise of his judgment, and when he exercised it and rendered a judgment
249 probably the judgment if it had stood unchallenged would have been a good foundation for the after proceedings. It did stand between one and two months before the law was passed under which it was reviewed, and probably a little longer before proceedings were taken to review it. While it so stood it does not appear that the plaintiff, or any one under whom he claims, had any knowledge of it or information concerning it except the railroad company, which also had knowledge of the proceedings to set it aside, and which took the bonds in bad faith and at its own risk. The writ of certiorari had been issued and served before that company received the bonds, and the return made to it before they were parted with by it. This is understood to be the common-law writ to remove the proceedings into the court issuing it; such seems to have been the effect contemplated by the statute. When issued and served it commenced to operate, and when returned it had operated, and the effect was to remove the cause and to take away all jurisdiction in the court from which it was taken. (Brooke's Apridgement, tit. Certiorari; 15 Keble, J. VI, H. VII, 16; Fitzh. Nat. Bre., 555, note a; 2 Hawk, P. C., ch. 27, sect. 62; 4 Black Com.,
250 321; Bailey vs. Lansing, 13 Blatch., 425.)

After the writ was served, and especially after return was made to it, there was no judgment in force in either court on which the authority of the commissioners could rest. The proceedings were still pending to the same effect that they were at any time before the judgment of the county judge had been rendered at all. The legitimate result is that the bonds were issued without authority and void. It is true that where agents are once clothed with authority by their principals those who know of it may presume it continues, and if it is revoked without their knowledge may safely continue to deal as if it continued. That is because it is more fair that the party who conferred the authority openly, and then privately took it away, should bear the consequences than that one who did not set it on foot should. (Story on Agency, § 491.)

In this case there was no agency conferred by the principal; if any was conferred at all, it was conferred by the operation of law, and if taken away by the same means, the reasons for holding the principal to it after it was gone would not apply. One party would be as innocent as the other.

251 There is a large class of cases wherein it has been held by the Supreme Court that where a municipality has lawful power to issue bonds or other negotiable securities, dependant only upon the addition of certain preliminary proceedings, the holder in good faith has a right to assume that such preliminary proceedings, have been had if the fact be certified on the face of the bonds by the authority whose primary duty it is to ascertain it. (Warren Co. vs. Marcey, Oct., 1877, Chicago Leg. News, June 1, 1878; Johnson Co. vs. January, 94 U. S., 202; Douglass Co. vs. Bolles, ibid., 104; Lynde vs. Winnebago Co., 16 Wall., 6; Knox vs. Aspinwall, 21 Dow., 539; St. Joseph vs. Rogers, 16 Wall., 644; Coloma vs. Eaves, 92 U. S., 484.) But this is not a case like those.

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After the writ was served, and especially after return was made to it, there was no judgment in force in either court on which the authority of the commissioners could rest. The proceedings were still pending to the same effect that they were at any time before the judgment of the county judge had been rendered at all. The legitimate result is that the bonds were issued without authority and void. It is true that where agents are once clothed with authority by their principals those who know of it may presume it continues, and if it is revoked without their knowledge may safely continue to deal as if it continued. That is because it is more fair that the party who conferred the authority openly, and then privately took it away, should bear the consequences than that one who did not set it on foot should. (Story on Agency, § 491.)

In this case there was no agency conferred by the principal; if any was conferred at all, it was conferred by the operation of law, and if taken away by the same means, the reasons for holding the principal to it after it was gone would not apply. One party would be as innocent as the other.

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The authorities to issue the bonds were not those charged with such duty. Those to issue the bonds were the commissioners; the one charged with that duty was the county judge; and, further, the bonds do not contain nor carry such a statement. They merely state what law they are issued under, and that it authorizes their issue, without stating that any act had been done under the law. Nor do they come within the doctrine that the mere statement in or upon the bonds that
252 they are issued in pursuance of a law, when issued by the officers charged with the duty of ascertaining whether precedent conditions have been complied with, is a sufficient warrant to a purchaser that they have been complied with, on which Knox vs. Aspinwall was partly placed, for they were not issued by officers so charged. The bonds recite matters of law merely, and are in effect like those in Marsh vs. Fulton Co., 10 Wall., 676, which were held to be invalid in the hands of an innocent purchaser.

It is also true that as these bonds are negotiable commercial securities an ordinary lis *p*indens would not affect them in the hands of an innocent purchaser. (Warren Co. vs. Marcey, ubi sup.) But this litigation upon the certiorari was different. It affected the judgment itself, which was the foundation of all authority to issue the bonds, and not the parties merely, and until it should be ended, leaving the judgment in force, there could be no such authority. In this case it was ended by holding the judgment for naught altogether, so that there never was a time, from the commencement of the proceedings upon certiorari by service of the writ to their termination, when there was any authority or color of authority for issuing the bonds.

253 They were issued under a general law of the State of New York providing for their issue only upon such a judgment, which was, by another general law, subject to review by such proceedings, and the proceedings were all upon the open and known public records of the courts of the State; and probably all persons dealing in them would be bound to know the general laws concerning them, and to look for the proceedings under the law by which only they could ever have any vitality, if they desired to know the same, as all persons are bound to know the general laws and the necessity and effect of proceedings under them relating to other subjects. But dealers in these bonds were not left to make good their presumed knowledge of the law by searching it out. The bonds themselves on their face referred to the law of their origin. This affected them directly with notice of all the requirements of that law. (McClure vs. Oxford, 94 U. S., 429.) By that they would be informed, or be bound to act as if informed, that the authority to issue the bonds would depend wholly upon a judgment with which the commissioners had nothing of the making to do, and concerning which they would have the same opportunities to learn by examining the records as any other persons. An examination of the records would
254 have shown them that the proceedings had been removed, and that there was no judgment in force remaining. So Leonard, Sheldon & Foster, and Elliott, Collins & Co., although they were holders for value before maturity, were not unaffected with notice of the defects in the bonds. (McClure vs. Oxford, sup.) And Elliott, Collins & Co., under whom the plaintiff claims, really took of the railroad company, which had only pledged the bonds to Leonard, Sheldon & Foster, and had remained the general owner, and was not a bona-fide holder in any sense, and their taking was after the proceedings had been ended and the judgment wholly quashed, and the record of the

ending had been completed in the office where the original proceedings were commenced.

These considerations seem to be fatal to the right of the plaintiff to recover.

These conclusions are different somewhat from those reached in the former case, and have been reached after more careful examination on that account, and in consideration of several cases referred to bearing directly upon this subject, several of which had not then been reported and some not then decided.

255 The motion is overruled.

Let judgment be entered on the verdict.

HOYT H. WHEELER.

256 (Endorsed:) U. S. circuit court, north. dist. of N. Y. John J. Stewart vs. Town of Lansing. Opinion. Wheeler, J. Filed Sept. 21, 1878.

257 *Bond on writ of error.*

Supreme Court of the United States.

JOHN J. STEWART, PL'FF IN ERROR,
vs.
THE TOWN OF LANSING, DEF'T IN ERROR.

Know all men by these presents that we, J. J. Stewart aforesaid, John O. Bloss, and Surron J. Harding, are held and firmly bound unto the said the Town of Lansing, def't in error, in the sum of five hundred dollars, to be paid to the said the Town of Lansing, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 10th day of January, A. D. 1879.

Whereas the above-named John J. Stewart hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the U. S. circuit court for the northern district of New York:

Now, therefore, the condition of this obligation is such that
258 if the above-named John J. Stewart, plaintiff in error, shall prosecute his said writ of error to effect, and shall answer all costs if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

J. J. STEWART, *Principal.* [L. S.]
By J. R. COX, *His Att'y.*
J. O. BLOSS, [L. S.]
S. J. HARDING, *Sureties.* [L. S.]

Sealed and delivered in presence of—
EDWIN F. COREY.

CITY & COUNTY OF NEW YORK, *ss:*

On this 11th day of January, 1879, personally came before me John O. Bloss and Surron J. Harding, to me known to be the same persons described in and who executed the foregoing instrument, and they, severally and duly, before me, acknowledged the execution of the same; and they, being severally and duly sworn by me, did thereupon sev-

erally depose and say, each for himself, that he was worth the sum of five hundred dollars over and above all debts and liabilities which he owes or has incurred.

In witness whereof I have hereunto set my hand and affixed
259 my official seal.

[L. S.]

EDWIN F. COREY,
Notary Public, City, County, and State of New York.

260 (Endorsed:) U. S. Supreme Court. John J. Stewart vs. the Town of Lansing. Copy. Bond on error. Jas. R. Cox, att'y for pl'ff in error.

I approve of the within bond. Dated Jan'y 27, 1879.

WM. J. WALLACE,
Dist. Judge.

Filed Jan'y 28, 1879.

261 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, between John J. Stewart, plaintiff, and the Town of Lansing, defendant, which was duly rendered and docketed at Utica, in said district, on the 17th day of December, 1878, in favor of said defendant for costs, $247.50, a manifest error hath happened to the great damage of the said plaintiff, John J. Stewart, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

Allowed by

WM. WALLACE,
Dist. Judge, Northern Dist. of New York.

262 (Indorsed:) Writ of error. Stewart v. Lansing. Filed Jan'y 28, 1829. A. C. Coe, clerk.

263 UNITED STATES OF AMERICA:

To the Town of Lansing, in the county of Tompkins, and to M. Goodrich, esq'r, att'y of said town:

You are are hereby cited and admonished to be and appear at a tere of

the Supreme Court of the United States to be holden at Washington on the 1st Monday of December, 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein John J. Stewart is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of Syracuse, in the northern dist. of N. Y., on the 31st day of January, A. D. 1879.

WM. J. WALLACE,
Judge of the Circuit Court for the North. Dist. of New York.

JAS. R. COX, *of Auburn, N. Y.,*
Att'y for Pl'ff in Error.

264 (Indorsed:) U. S. Supreme Court. John J. Stewart, pl'ff in error, v. the Town of Lansing, def't in error. Citation.

Due service of the within citation is hereby admitted.

M. GOODRICH,
Def't's Att'y.

Milo Goodrich, Auburn, N. Y. Filed Feb. 1, 1879.

265 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that I have compared the writings annexed to this certificate with their respective originals, now on file and remaining of record in my office, and that they are correct copies thereof, being a complete transcript of the record and proceedings had in said court in the suit of John J. Stewart vs. The Town of Lansing.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Utica, in said northern district of New York, this 26th day of March, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[SEAL.] CHARLES MASON, *Clerk.*

266, 267 Supreme Court of the United States, at December term, 1878, that is to say, January , 1879.

JOHN J. STEWART, PL'FF IN ERROR,
vs.
THE TOWN OF LANSING, DEF'T IN ERROR.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the said court, at the Capitol in Washington, comes the said John J. Stewart, plaintiff in error, by James R. Cox, his attorney, and says that in the record and proceedings in the above case there is manifest error in this, to wit, that in the rulings of the court upon the admission of improper evidence, and in the directing of verdict and judgment for the said defendant, the court erred, and because the said plaintiff was well entitled to the verdict and judgment, which the court below denied him.

Wherefore the said plaintiff in error prays that the judgment
268 aforesaid may be reversed, annulled, and altogether held for

nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

JAS. R. COX,
Att'y for Pl'ff in Error.

Joinder.

269 Supreme Court of the United States.

JOHN J. STEWART, PL'FF IN ERROR,
vs.
THE TOWN OF LANSING, DEF'T IN ERROR.

Afterwards, to wit, on the first Monday of December, in December term, A. D. 1878, the said the Town of Lansing, defendant in error, by M. Goodrich, its attorney, freely comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and prays that the said Suprme Court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in from aforesaid given, may be in all things affirmed, &c.

M. GOODRICH,
Def't's Att'y.

270 (Indorsed:) U. S. Supreme Court. John J. Stewart v. the Town of Lansing. Assign't of errors & joinder.

(Indorsement on cover:) No. 184. John J. Stewart, plaintiff in error, vs. the Town of Lansing. N. New York C. C. U. S. Filed 23rd April, 1879.

14-512

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~443.~~ 469 18

SAMUEL STRONG, APPELLANT,

vs.

CHARLES F. WILLEY.

No. ~~444.~~ 470 19

SAMUEL STRONG, APPELLANT,

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APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 10, 1875.

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2d. The defendants are residents of the District of Columbia. Defendant Strong is sued in his own right, and defendants Taylor
4 and Brodhead as agents or officers representing the District of Columbia, and known as the board of audit, and charged by law with adjusting certain classes of the indebtedness of said District to its creditors, among which classes is the indebtedness hereinafter more particularly stated.

3d. The defendant Strong, on or about the day of 1873, obtained a contract from the late board of public works of said District, to construct a sewer along 15th and Boundary streets, in Washington City in said District, to wit, a sewer commencing on 15th street near G street N. E., and running thence along 15th street to Boundary, & thence along Boundary st. to 11th street east, and being unable by reason of his want of money or credit to perform said work, sub-let
5 a portion of the same to the complainant by a written instrument in words and figures as follows, to wit:

This agreement, made and concluded this sixth day of May, A. D. 1874, by and between Samuel Strong of the first part, and C. F. Willey and Company of the second part, witnesseth:

That the said Strong hereby agrees to employ the said C. F. Willey and Company to build and finish the sewer on 15th and Boundary streets in the city of Washington, according to the specifications contained in the contract duly executed by the said Strong with the board of public works, the said C. F. Willey and Co. to furnish all material and pay for all labor in connection therewith.

The said Strong hereby agrees to pay the said C. F. Willey and
6 Company the sum of thirty dollars per lineal foot, the same to be paid in orders of the said Strong on the board of public works, payable in sewer bonds, the said orders to be paid and delivered to the said C. F. Willey & Co. as fast as they complete each one hundred lineal feet of sewer.

The said C. F. Willey & Company hereby agree to complete and finish the said sewer according to the specifications, in ninety days from the date hereof.

It is further agreed that all payments shall be made upon the certificates of the inspectors of the board of public works that the work has been done according to contract.

The said Strong further agrees that if the board of public works shall elect to pay his said orders in money or other securities acceptable to the said Willey & Co., they shall be entitled to any benefit arising therefrom.

7 In testimony whereof the said parties have hereunto affixed their hands and seals the day and year hereinbefore written.

SAMUEL STRONG. [SEAL.]
C. F. WILLEY & CO. [SEAL.]

Witness:
L. HUYCK.

And the complainant at once, after the execution of the said agreement, proceeded energetically to perform the work and furnish the material contemplated thereby and completed his portion of said sewer on the 8th day of August, 1874, and the same was accepted by the District government and final measurement thereof made by its proper officer on the 26th day of August, 1874, and the said measurement has been approved and was filed, as complainant is informed and believes, and

so charges, with the board of audit as the data for final settlement for constructing said sewer; that complainant furnished all the ma-
8 terial and performed all the labor required for or that entered into the construction of 1,089 feet of said sewer; that for said material and labor the defendant Strong, according to the strict terms of the law, became indebted, and the District of Columbia or city of Washington, therein represented by said defendants, Taylor and Brodhead, in equity became indebted, to this complainant in the sum of $32,670.00, which amount of indebtedness is verified by the measurement aforesaid; that of said indebtedness, the complainant has received from orders of said Strong, given in the months of May and June last on the late board of public works, certificates of indebtedness of said board to the amount of five thousand dollars, and has received
9 nothing more in money or securities from any source, and there is now due him the sum of $27,670.00 under the agreement aforesaid.

4th. The complainant further says that about the time of and soon after executing said agreement with defendant Strong, he was required to and did give bond for the faithful performance of the same with Robert Campbell, a business and responsible man, as surety; thereupon it was agreed, for the protection of the complainant and of his surety Campbell, that defendant Strong should as fast as sections of one hundred lineal feet of said sewer should be completed give to said Campbell an order upon the late board of public works for the sum of three thousand dollars, and in part execution of said last mentioned
10 agreement, which was between complainant and said defendant Strong, he did give at different times between the month of May, 1874, and the 6th day of August of the same year, orders on said board in favor of said Campbell to the amount of $20,446.00, one of which is in the following form, to wit:

WASHINGTON, D. C., *May 5th*, 1874.

To the board of public works:

Pay to the order of Robert Campbell three thousand dollars, and charge the same to my account.

SAMUEL STRONG.

And the other orders are of same tenor, excepting date and amount; that said Strong has given orders on said board to amount of $6,535.00, on which five thousand dollars has been paid in certificates as aforesaid, leaving a balance due the complainant on the work aforesaid the sum of $5,689.00, for which the said Strong refuses to
11 give even an order for the payment, alleging as the only reason for such refusal that complainant is indebted to his workmen about $3,500.00, thereby withholding what was supposed to be the means of paying an indebtedness, the non-payment of which he makes a pretext for such withholding.

5th. Complainant further advises the court that he caused said orders from said defendant Strong to be filed, a part of them with the late board of public works and the others with the present District government; that said board at all times recognized them as valid assignments of the amount they represented, but now, so it is, may it please the court, that since the completion of said sewer the said Strong,
12 both by himself and by attorney, has made and is still making strenuous efforts to induce the said board of audit,

to wit, said defendants Taylor and Brodhead, who have charge of the settlement of the account for constructing said sewer, to effect a settlement directly with him as the contractor and ignore said orders, and the said board of audit has advised the complainant that they have no time to adjust conflicting claims, and advise him to appeal to the court, where certain and adequate relief can be given.

Complainant further says that all of said orders, excepting one of $535.00, have been returned to him in consequence of said interference by said Strong and refusal by said board of audit; that said Strong is represented to be, and
13 complainant believes and so charges him to be insolvent; that complainant is largely indebted for labor and material that entered into the construction of said sewer, and will be utterly unable to pay any considerable portion thereof unless he can obtain a specific performance of said agreement with defendant Strong; that he is informed, believes, and so charges, that said Strong will in a day or two, if not restrained by this court, obtain from said board of audit a certificate of the entire indebtedness under his contract with the late board of public works for building said sewer, which certificate will be equitably assignable, and his attorney has declared such to be his
14 intention; that if said Strong obtains such certificate complainant believes and so charges that it is his intention, and that he will carry such intention into effect, to cheat and defraud this complainant out of the amount due him as aforesaid, and thereby cheat and defraud many laborers, and men who furnished the material for said sewer.

6th. Complainant further says that he has never had a copartner in the execution of said agreement with said Strong, and did not have any at the time it was made. Said fact was well known to said Strong.

The complainant therefore prays—

1st. For process of subpœna requiring defendant to appear and answer, &c.

15 2d. That the said Samuel Strong, his agents or attorneys, may be restrained by the order of this court from in any way interfering with the board of audit in the settlement for work done and material provided for said sewer by complainant, and particularly that said Samuel Strong, his agents and attorneys, may be restrained from asking or receiving from said board of audit, or from any officer or other person, any certificate, bond, order, evidence of indebtedness, or statement of account, for the work done by complainant under the agreement aforesaid with said Strong.

2d. That a specific performance may be decreed of the agreement herein set out, between said Strong and the complainant, and,
16 if necessary, that pending this suit a receiver may be appointed to receive from said board of audit payment, or effect a settlement, for work done under said contract.

3d. And for such further and other relief as to the court shall seem meet and just.

CHARLES F. WILLEY.

The defendants to this bill are: Samuel Strong, Robert W. Taylor, John M. Brodhead.

L. G. Hine, of counsel, & sol'r for compl't.

I, Charles F. Willey, on oath, say that I have heard read the foregoing bill by me subscribed and know the contents thereof, and

17 that the facts therein stated on personal knowledge are true, and that the facts stated on information and belief I believe them to be true.

CHARLES F. WILLEY.

Sworn to and subscribed before me this 7th day of September, 1874.

R. J. MEIGS,
Clerk S. C. D. C.,
By R. J. MEIGS, JR.,
Ass't Clerk.

Filed Sept. 7, 1874.

18 *Answer of defendant Strong.*

In the supreme court of the District of Columbia this 14th day of September, A. D. 1874. In equity.

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } No. 3409.

In answer to the said bill of complaint the defendant Samuel Strong, not waiving the right to object to the many errors and insufficiencies to the complainant's bill, for answer thereto, or so much thereof as he is advised is material thereto for him to answer, says:

1. That the complainant is not a resident of the District of Columbia, but resides in the State of Tennessee, with his family, as he informed this defendant.

2. That the complainant's bill alleges a breach of a common-
19 law covenant, and his remedy is full and complete at law for a breach of said covenant; that the bill, therefore, shows no ground of equity.

3. The defendant admits that he obtained a contract from the late board of public works, as stated in paragraph three of complainant's bill; but he denies that he sublet a portion of this contract to the complainant because of a want of money or credit; that he possesses an abundance of both money and credit to carry on all his contracts; that he sublet this contract because he had more work than he could attend to.

4. The defendant admits that he entered into a contract with the complainant to construct the sewer therein mentioned, but he denies that the copy set forth in the complainant's bill is a true copy of said contract.

5. The second paragraph of said contract, as stated in the complainant's bill, is garbled, and misleads the court as to the intention of the parties.

20 6. The true and original contract is in the following words and figures, to wit:

This *argument*, made and concluded this sixth day of May, A. D. 1874, by and between Samuel Strong, of the first part, and C. F. Willey and Company, of the second part, witnesseth:

That the said Strong hereby agrees to employ the said C. F. Willey and Company to build and finish the sewer on 15th and Boundary streets, in the city of Washington, according to the specifications continued in the contract duly executed by the said Strong with the board of public works, the said C. F. Willey & Co. to furnish all materials and pay for all labor in connection therewith.

The said Strong hereby agrees to pay the said C. F. Willey & Com-

pany the sum of thirty dollars per lineal foot; the same to be paid in orders of the said Strong on the board of public works, payable
21 in sewer bonds; the said orders to be paid and delivered to the said C. F. Willey & Co. as fast as they complete each one hundred feet of sewer.

The said C. F. Willey & Co. hereby agree to complete and finish the said sewer according to the specifications in ninety days from the date hereof.

It is further agreed that all the payments shall be made upon the certificates of the inspectors of the board of public works that the work has been done according to contract.

The said Strong further agrees that if the board of public works shall elect to pay his said orders in money or other securities acceptable to the said Willey & Co., they shall entitled to any benefit arrising therefrom.

In testimony whereof the said parties have hereunto affixed their hands and seals the day and year hereinbefore written.

(Signed) SAMUEL STRONG. [SEAL.]
C. F. WILLEY & CO. [SEAL.]

Witness:
L. HUYCK.

Exhibit K.

22 7. By the terms of the contract this defendant obligated himself to give to the complainant an order on the board of public works for the sum of three thousand dollars on the completion of each one hundred feet of said sewer.

8. That in fulfillment of said covenant this defendant did, on the 29th day of May, A. D. 1874, when the first one hundred feet was completed, give to the complainant an order on the said board of public works for three thousand dollars, and took his receipt therefore—(Exhibit A.) That on the 11th day of June, A. D. 1874, when the second one hundred feet of said sewer was completed, this defendant gave this complainant a second order on the board of public works for the like sum of three thousand dollars—(Exhibit B.)

That on the 22nd day of June, A. D. 1874, when the third one hundred feet of said sewer was completed, this defendant gave
23 to this complainant two orders on the board of public works, one for $2,464.50 and the other $535.50, which two orders amount in the aggregate to $3,000.00—(Exhibit C.)

That on the 27th day of June, A. D. 1874, when the fourth one hundred feet of said sewer was completed, this defendant gave to this complainant a fourth order on the board of public works for three thousand dollars—(Exhibit D.)

That on the third day of July, A. D. 1874, when the fifth one hundred feet of said sewer was completed, this defendant gave to this complainant a fifth order on the board of public works for three thousand dollars—(Exhibit E.)

That on the 15th day of July, A. D. 1874, when the sixth one hundred feet and the seventh one hundred feet of the said sewer was completed, this defendant gave to this complainant two orders on the board of public works for three thousand dollars each—(Exhibit F.)

24 That on the seventeenth day of July, A. D. 1874, when additional work had been done on said sewer, this defendant gave to this complainant an order on the Commissioners for the District of

Columbia for three thousand five hundred and twenty-three dollars and thirty cents—(Exhibit G.)

That on the 5th day of August, A. D. 1874, when an additional one hundred feet of said sewer was completed, this defendant gave to this complainant an order on the Commissioners for the District of Columbia for three thousand dollars—(Exhibit H.)

That on the 20th day of August A. D. 1874, when one hundred feet of said sewer was completed, this defendant gave to this complainant an order on the Commissioners for the District of Columbia for three thousand dollars—(Exhibit I.)

8. That this contract entered into between this defendant and
25 this complainant called for these orders, and did not call for any other consideration whatsoever.

That these orders amount to thirty thousand five hundred and twenty-three dollars and thirty cents (30,523.30.)

9. The defendant denies that there is still a balance due the complainant of $5,689.00 as alleged in paragraph four of complainant's bill, and he denies that he has ever refused to give an order for said balance.

10. He avers that no final measurement has been had of said sewer, which, by the terms of the contract, is made a condition precedent, and that no balance is either demandable or payable until after the complainant has produced this certificate of final measurement, as provided for in paragraph four of the contract. When this final measurement is had, this defendant is ready to give such order as is contemplated by the contract.

26 11. This defendant avers that on the 17th day of July, A. D. 1874, at the earnest solicitation of this complainant, certified to the payroll of the workmen of this complainant, and gave an order on the Commissioners for the District of Columbia to pay the said laborers the amount then due them, amounting to $3,523.30, for which complainant gave his receipt, Exhibit G, thus giving this complainant the benefit of the difference between money and sewer bonds, saving to this complainant from sixteen to eighteen hundred dollars, for which this defendant received no consideration whatsoever.

12. The defendant denies that this complainant completed said sewer on the 8th day of August, A. D. 1874, or at any other time, but charges that the complainant refused to complete it, and this defendant has been compelled to employ men to finish the same.

27 13. This defendant has not been advised that a final measurement of said sewer was made on the 26th day of August, A. D. 1874, or at any other time, and does not now know that any final measurement has been approved and filed, as alleged in paragraph three of complainant's bill. When he is officially advised such final measurement has been made, and said work has been duly accepted by the proper officers of the District government, he repeats that he stands ready to give any further order that may be found due the complainant under his contract.

14. This defendant has been always anxious to complete said sewer at as early a day as possible; that on the 19th day of August, A. D. 1874, he caused a letter to be handed to this complainant, of which the following is a copy:

WASHINGTON, *August* 19, 1874.

C. F. WILLEY & CO.:

28 GENTLEMEN: You are hereby notified that you will be required to thoroughly clean that portion of the Boundary street sewer built by you.

I would also state that as soon as you return the tools and other property received from me by you for use on the sewer, and present the certificate of the superintendent that the sewer is accepted as being built according to contract, I will be ready to make a final settlement with you. * * *

Yours,
(Signed) SAMUEL STRONG.

This defendant avers that the complainant refused to clean out said sewer, and it is now being done under the direction of this defendant, and a final measurement is not possible until after that work is complete.

16. This defendant further avers that at the time he made the contract with complainant, the complainant informed this defendant that he had arranged with one Clements to join him and furnish
29 the sum of one thousand dollars, and also with one Patrick McAnally, who would furnish the sum of two thousand dollars, and that the said parties were to be interested with him in said work, and were to be his copartners.

That said representations were made to this defendant in the presence of Leonard Huyck, and that it was upon, and only upon, such representation that this defendant was induced to enter into the contract with this complainant, as this defendant well knew that complainant had neither money credit sufficient to carry on the work.

17. The allegation in paragraph six of complainants, that "this defendant knew at the time of the execution of said agreement that complainant had no partners," is entirely false. The complainant is estopped from making this averment by the fact that he signs the contract and all the receipts C. F. Willey & Co.

30 18. The defendant denies that he has ever, as alleged in paragraph five of complainant's bill, either by himself or his attorney, or any other person or persons, acting under his authority, made any efforts whatever to induce the said board of audit, or said defendants Taylor and Broadhead, to ignore any of his said orders either at the time stated in complainant's bill or at any other time.

19. The defendant denies that all of said orders, except one for $535.00, have been returned to complainant. He avers that on the 29th day of May, A. D. 1874, this defendant gave to complainant an order on the board of public works for $3,000.00, which was duly honored by said board, and audit of certificates issued therefor; and that on the 11th of June, A. D. 1874, defendant gave to complainant a second order on the Board of Public Works for $3,000.00, on which he has drawn auditor's certificates to the amount of $2,000 from said board.

31 20. The defendant denies that any of said orders have been returned to complainant because of the interference of this defendant, and that all and every of said allegations of interference by this defendant are utterly false, and without any foundation in fact, and that there has not been anything done or contemplated to be done, by this defendant, or by any one authorized to act for him, on which to base such allegations.

21. The defendant further states that the charge made by complainant, in paragraph five of complainant's bill, that this defendant is insolvent, is utterly false, and the complainant well knew the same to be false, and said charge is malicious as this defendant believes—that it was made for the purpose of wilfully injuring this defendant.

22. The defendant denies that he has applied to the board of audit,

or to any one representing them, for a certificate of the entire
32 indebtedness under his contract for building said sewer, and denies that he has had any intention of so doing, and he denies that any one authorized to act for him has ever declared such to be his intention. He further says that if any one pretending to be the attorney of this defendant has made such assertion, this defendant ignores such act, and the charge that this defendant had any intention to defraud any laborers, or any other person or persons, is utterly false and wilfully malicious.

The defendant resists the prayers of complainant for an injunction and the appointment of a receiver, and having fully answered, prays to be dismissed with his proper costs.

SAMUEL STRONG.

LILLEY & MOORE,
Solicitors for Defendant.

33 I, Samuel Strong, on oath say that I have heard read the foregoing answer by me subscribed, and know the contents thereof, and that the facts therein stated on personal knowledge are true, and that the facts stated on information and belief I believe to be true.

SAMUEL STRONG.

Sworn and subscribed before me this 14th day of September, 1874.

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Asst. Clerk.

Filed Sept. 14, 1874.

34 *Restraining order.*

In the supreme court of the District of Columbia. In equity.

CHAS. F. WILLEY
vs.
SAM'L STRONG ET AL. } No. 3904.

This cause coming on to be heard on the motion of complainant for injunction, and having been heard, it is this 19th day of Sept., 1874, ordered and adjudged that the defendant Strong is hereby enjoined from collecting or receiving from the Board of Commissioners of the District of Columbia, or board of audit, or other persons or person, payment or certificates or orders to the amount and for the sum of five thousand six hundred and sixty-five dollars on account of the work mentioned and set forth in the bill and answer in this case, until the further order of the court.

D. C. HUMPHREYS,
Justice, D. C.

Filed Sept. 19, 1874.

35 *Replication.*

Supreme court, D. C.

C. F. WILLEY & CO.
vs.
SAM'L STRONG ET AL. } Eq. No. 3904.

The plaintiff hereby joins issue with the defendant Strong.

L. G. HINE,
Sol'r for Plff.

Filed Oct. 5, 1874.

36 *Leave to amend answer.*

Supreme court of the District of Columbia.

CHAS. F. WILLEY
vs.
SAM'L STRONG ET AL. } 3904.

On motion of Enoch Totten, sol'r for defendant Strong, and by consent of opposing counsel, Mr. Hine, it is, this 19th day of July, 1875, ordered that said defendant Strong be, and he is hereby, authorized to file an amendment to his original answer in order to correct the number of feet of sewer admitted as being built by plaintiff.

By the court.

Filed July 19, 1875.

37 *Amendment to answer of Strong.*

In the supreme court of the District of Columbia.

WILLEY
vs.
STRONG ET AL. }

The defendant Strong, by way of amendment to his answer in the above cause, says that the said complainant Willey built and completed 758 feet of the said sewer, and not more, and that he is entitled to an allowance for that number of feet and no more.

ENOCH TOTTEN,
Sol'r for Def't Strong.

WASHINGTON CO., D. C., *ss:*

I, Samuel Strong, being duly sworn, say that the foregoing answer is true of my own knowledge.

SAMUEL STRONG.

38 Sworn & subscribed to before me this 17 day of July, 1875.

WM. MARTIN,
Justice of the Peace.

Filed July 19, 1875.

I cannot oppose the filing of this amendment.

L. G. HINES,
Sol'r for Willey et al.

39 *Original process.*

In the supreme court of the District of Columbia, February 2d, 1875.

SAMUEL STRONG, COMPLAINANT,
against
CHAS. F. WILLEY ET AL., DEFENDANT. } No. 4144. Equity docket 14.

The President of the United States to Chas. F. Willey, Robt. Campbell, William Lilley, G. W. Balloch, District of Columbia, William Dennison, J. H. Ketcham, S. L. Phelps, com'r; J. M. Brodhead, R. W. Taylor, board of audit; and Fitzhugh Coyle, comptroller, &c., defendant:

You are hereby commanded to appear in this court at its first special

term, occurring twenty days after service of this subpœna, and
40 answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Carter, chief justice.

R. J. MEIGS,
Clerk, &c.,
By J. P. WILLIAMS,
Ass't Clerk.

(Endorsement on the above as follows:) No. 4144. Equity docket 14. Spa. to ans. original bill. Samuel Strong vs. C. F. Willey et al. Issued February 4, 1875. Returned February 6, 1875. Served C. F. Willey & Robert Campbell; also served notice for def't at same time. February 5th, 1875.

Service this the 6th January, 1875, on the Dist. of Columbia,
41 on W. Dennison, J. H. Ketcham, S. L. Phelps, and F. Coyle acknowledged.

WM. BIRNEY,
Ass't Attorney D. C.

Restraining order.

An original bill praying that defendants Willey, Campbell, and Lilley be restrained from collecting from the authorities of the District of Columbia any evidence of indebtedness or moneys on account of contracts of complainant, and they and defendant Balloch be required to place all orders or evidence of indebtedness in their hands arising
42 out of or on account of contracts of complainant into the custody of the court, and defendant Balloch be also required to place all moneys in his hands as trustee for said Willey or Campbell arising out of said contracts into the custody of the court, and the defendants, the commissioners and comptroller of the District, be restrained from issuing certificates to any party other than complainant on account of orders given said Willey, Campbell, or Lilley, and the board of audit be restrained from issuing certificates to said Willey, Campbell, or Lilley on account of orders of complainant, is this day filed. Hearing is fixed for Thursday, February 12th, 1875, at 11 o'clock m. Until further order you are hereby restrained as prayed.

By order of the court.

M. 9, '64.

A. WYLIE,
Justice, &c.

Attest:

, *Clerk, &c.,*
By , *Ass't Clerk.*

43 *Original bill.*

In the supreme court of the District of Columbia.

SAMUEL STRONG, COMPLAINANT, *vs.* CHARLES F. WILLEY, ROBT. CAMPBELL, William Lilley, G. W. Balloch, District of Columbia, William Dennison, J. H. Ketcham, and S. L. Phelps, commissioners of the same; R. W. Taylor, and J. M. Brodhead, board of audit for the same; and Fitzhugh Coyle, comptroller of the same, defendants.	In equity. No. .

To the supreme court of the District of Columbia, sitting in equity for said District.

The complainant complains as follows, viz:

44 First. That he is a citizen and resident of the District of Columbia, and brings this suit in his own right.

Second. That the defendants Charles F. Willey, Robert Campbell, William Lilley, G. W. Balloch are citizens of the United States and resident of the District of Columbia.

Third. The District of Columbia is the designation of the government in and for said District. William Dennison, J. H. Ketcham, and S. L. Phelps are the commissioners of said district, and are sued in their official capacity. R. W. Taylor and J. M. Brodhead are the board of audit for said District and are sued in their official capacity. Fitzhugh Coyle is the comptroller for said District and he is sued in his official capacity.

45 Fourth. The complainant entered into a contract with the late board of public works of said District, No. 774, for the performance of certain sewer work described therein, and on May 6, 1874, by an agreement in writing of that date with the defendant Charles F. Willey, by the name of C. F. Willey & Co., he sublet to C. F. Willey & Co., at the rate of thirty dollars per linear foot, so much of said contract as had been unfinished by the complainant, which was supposed to be about 1,000 linear feet, the said C. F. Willey and Co. agreeing to perform said work in accordance with the requirements of said contract, and to pay for all material and labor upon their portion of the same. All the foregoing transactions were had with Charles F. Willey for and in

46 behalf of and in the name of C. F. Willey & Co., the said Willey having represented to complainant that he had for a partner a man of pecuniary means, but on being pressed by complainant to disclose the name of such partner, confessed that he had no partner, whereupon the complainant required security of said C. F. Willey, and thereupon, on the 22d day of June, 1874, the said C. F. Willey, by the name of C. F. Willey & Co., by a writing of that date furnished a guaranty of the defendant Robt. Campbell that the said Campbell would be responsible to the extent of three thousand dollars for the payment by C. F. Willey & Co. of the bills for material and labor furnished by C. F. Willey & Co. in the performance of the work aforesaid. By mem-

47 oranda attached to said writing it was also agreed by the complainant and said Charles F. Willey, by the name of said C. F. Willey & Co., that the orders given by complainant for the payment of said Willey & Co. should be delivered to said Campbell, who was to act

as trustee for complainant as well as for Charles F. Willey, by the name of C. F. Willey & Co.

Fifth. The defendant Charles F. Willey, by the name of C. F. Willey & Co., entered upon the work which he had engaged to do, and continued to perform the same to a certain time, when he abandoned and gave up the same, at which time he represented falsely and fraudulently to the complainant that he had performed said work according to his engagement, and that the same measured one thousand and eighty
48 linear feet, and at the rate of thirty dollars per linear foot would amount to thirty-two thousand four hundred dollars, which he claimed as justly due from said complainant.

Sixth. The complainant, relying upon said representation as aforesaid, then gave said Charles F. Willey by the name of C. F. Willey & Co., orders for certificates of the auditor of the board of public works, which with like orders which he had from time to time previously given Charles Willey by the name of C. F. Willey & Co., and with orders from said C. F. Willey & Co., which he, the complainant, had from time to time accepted, and with orders which he had given to the defendant Robt. Campbell at the request of said Charles F. Willey by the name of
49 C. F. Willey & Co., made the sum of thirty thousand dollars, which said Charles F. Willey by the name of C. F. Willey & Co. had claimed to be less than the full sum to which their work amounted, including all sums due for labor and material, at the same time falsely and fraudulently representing that less than three thousand dollars were due for labor and material on the work aforesaid.

Seventh. After such payments to said Charles F. Willey, by the name of C. F. Willey & Co., the complainant discovered that said C. F. Willey & Co. had not completed one thousand and eighty linear feet of said sewer work as they had represented, but instead only nine hundred and sixty feet, the difference being one hundred and twenty feet, which, at the price agreed on with the said Charles F. Willey by the name
50 of C. F. Willey & Co., to wit, thirty dollars per linear foot, amounted to three thousand six hundred dollars. In addition to this sum materials were furnished to said Charles F. Willey, by the name of C. F. Willey & Co., for which the complainant was obliged to pay and money loaned by him to said Charles F. Willey, by the name of C. F. Willey & Co., which C. F. Willey & Co. have never paid, amounting to three thousand and ninety-three dollars. In addition to these sums the complainant was obliged to become responsible for said Charles F. Willey, by the name of C. F. Willey & Co., for the further sums of one hundred and seventy-five dollars for man-hole tops, and one hundred and fifty dollars for cleaning out the sewer built by said Charles
51 F. Willey, by the name of C. F. Willey & Co., and the further sum of thirteen hundred and twenty eight $\frac{37}{100}$ dollars for hauling away the dirt and rubbish left by said C. F. Willey & Co., all of which said Charles F. Willey, by the name of C. F. Willey & Co., had engaged to furnish and perform, and the same was included in the rate of thirty dollars per linear foot which said complainant had engaged to pay said Charles F. Willey, by the name of C. F. Willey & Co. In addition to these several sums there was ordered to be paid, and was paid by the commissioners of the District of Columbia, the further sum of five thousand and eighty-two $\frac{36}{100}$ dollars to the laborers and employees of said Charles F. Willey, by the name of C. F. Willey & Co., whom he had failed to pay, the whole of which sum was charged in account
52 against said contract 774, and deducted from the amount due the complainant under said contract. The total of the various sums

enumerated as paid and accepted by complainant for and on account of Charles F. Willey, by the name of C. F. Willey & Co., amounted to the sum of thirty-nine thousand seven hundred and fifty-three $\frac{83}{100}$ dollars, and is in excess of the sum due said Charles F. Willey, by the name of C. F. Willey & Co., viz, twenty-eight thousand nine hundred and fifty-three $\frac{83}{100}$ dollars, of a just and proper payment for all the work performed by said Charles F. Willey, by the name of C. F. Willey & Co., for the complainant.

Eighth. The complainant is informed and believes that there is yet due the laborers and employees of said Charles F. Willey, by the
53 name of C. F. Willey & Co., a further sum of about four thousand dollars, which the said Charles F. Willey, by the name of C. F. Willey & Co., and said Robert Campbell are endeavoring to have paid by said commissioners of the District of Columbia.

Ninth. The complainant is further informed and believes that the said Charles F. Willey, by the name of C. F. Willey & Co., and said Robert Campbell have drawn upon orders given them by complainant a sum between eighteen and nineteen thousand dollars, and that said Charles F. Willey, by the name of C. F. Willey & Co., and said Robert Campbell are endeavoring and fully intend to collect the balance of said orders, amounting to between fourteen and fifteen thousand dollars, without regard to the fact that they have been both already overpaid by
54 complainant, and to do this for the purpose of putting the same into the hands of Charles F. Willey to enable him to carry the same out of the jurisdiction of this court into the State of Tennessee, where said complainant is informed and believes the family of said Charles F. Willey is now living.

Tenth. The defendant Robert Campbell was a surety for Charles F. Willey, by the name of C. F. Willey & Co., as before explained, and had furnished brick to said Charles F. Willey, by the name of C. F. Willey & Co., for the said C. F. Willey & Co.'s sewer work, as the complainant is informed and believes, to the amount of twenty-five hundred dollars, and for the same and upon the agreement between said Charles F. Willey and himself, has collected, as the complainant is informed and
55 believes, over thirteen thousand dollars, although said Robert Campbell has never paid any of the bills for labor and materials, as provided in his guaranty aforesaid, and has neglected and refused so to do.

Eleventh. The complainant is informed and believes that the said Robert Campbell is endeavoring and intending to collect the balance before mentioned of ten thousand nine hundred and fifty-three $\frac{83}{100}$ dollars of orders given by complainant to said Charles F. Willey by the name of C. F. Willey & Co. for the purpose of assisting said Charles F. Willey to obtain the same, and immediately depart beyond the jurisdiction of this court without making provision for the payment of the respective sums due from him, the said Charles F. Willey, to the
56 complainant or for the return or cancellation of the orders before mentioned given and accepted by complainant for and on account of said Charles F. Willey by the name of C. F. Willey & Co.

Twelfth. The complainant further complains that Charles F. Willey, by the name of C. F. Willey & Co., procured an injunction to restrain him from collecting or receiving any auditor's certificates for work done under said contract 774, and the said defendant William Lilley, as the attorney for complainant, procured an injunction bond signed by one H. S. Johnston, upon the filing of which the restraining order was vacated, except so far as concerned the payment of certain labor bills on

said contract 774. In order to secure said Johnson for signing said bond the complainant gave the defendant William Lilley an
57 order for certificates for six thousand dollars, the certificates upon which order the said William Lilley was to hold for the security of said H. S. Johnston until the liability of said H. S. Johnston should cease, when said certificate was to be returned to complainant.

Upon a final hearing of said injunction the same was dissolved by order of the court, ex so far as related to money due certain laborers on contract 774, amounting, as complainant is informed and believes, to the sum of $2,400, which sum the complainant is informed and believes has since been paid by the orders of the commissioners of the District of Columbia.

The complainant avers that the liability of said H. S. Johnston for signing said bond has ceased, and that said William Lilley has no right
58 to or property in said order for $6,000. Yet the said William Lilley, as complainant is informed and believes, is endeavoring to collect the same, notwithstanding the complainant has notified the defendants, the said board of audit, not to regard said order as valid or binding on him, the complainant, and has also notified said William Lilley not to collect said order.

Thirteenth. The defendant Geo. W. Balloch as complainant is informed and believes, is acting as trustee for said Charles F. Willey by the name of C. F. Willey & Co., and for said Robert Campbell, and holds the moneys, certificates, and bonds which have been received by said Charles F. Willey, by the name of C. F. Willey & Co., and by said Robert Campbell, out of the moneys justly due the complainant as hereinbefore explained and specified.

59 The complainant therefore prays—

1st. That the usual process of subpœna issue against said defendants.

2nd. That the defendant Charles F. Willey, by his proper name, or by the name of C. F. Willey & Co., be restrained from collecting or attempting to collect from the District of Columbia, or any of the officials thereof, or from the board of audit, any moneys, certificates, or evidences of indebtedness upon any orders given to him or accepted for him by the complainant, and be required to place all the same now in his possession, custody or control in the custody of this court.

3d. That the defendant Robert Campbell be restrained from collecting or attempting to collect from the District of Columbia or any of the officials thereof or from the board of audit any monies, certificates,
60 or evidences of indebtedness upon any order given to him or accepted for him by the complainant, and be required to place all the same now in his possession, custody, or control into the hands of this court.

4th. That the defendant William Lilley be restrained from collecting or attempting to collect from the District of Columbia or any official thereof or from the board of audit an order for $6,000 given to him by complainant, and be compelled to withdraw said order from said board of audit and place the same in the custody of this honorable court.

5th. That the defendant George W. Balloch be restrained from paying out or delivering to Charles F. Willey or C. F. Willey & Co. or Robert Campbell or the agent or assignees of either or all of them any moneys, certificates, or evidences of indebtedness which he may hold for
61 said Charles F. Willey or C. F. Willey & Co. or Robert Campbell or either of them, arising out of any transaction of or with complain-

ant, and that he be required to pay and deposit all such moneys or certificates into the custody of the court.

6th. That the District of Columbia and William Dennison, J. H. Ketcham; and S. L. Phelps, the commissioners thereof, be restrained from paying to said Charles F. Willey, or C. F. Willey & Co., Robert Campbell, William Lilley, and George W. Balloch, or either of them, severally, any monies, certificates, or evidences of indebtedness on account of the several orders and accounts hereinbefore spoken of; that the board of audit be restrained from delivering to said Charles F. Willey, or C. F. Willey & Co., Rob't Campbell, William Lilley, and George W. Balloch certificates or evidences of indebtedness in settlement of the several orders and accounts hereinbefore specified.

7th. That the defendant Fitzhugh Coyle be restrained from
62 countersigning any certificates of indebtedness which may be issued in settlement of the several orders and accounts hereinbefore specified.

8th. And for such other and further relief as may seem proper and equitable for this honorable court to grant.

SAMUEL STRONG.

W. A. COOK,
GEO. W. DRYER,
Sol'r for Complainant.

I do solemnly swear that I have read the bill by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

SAMUEL STRONG.

Subscribed and sworn to before me this 4th day of February, 1875.

R. J. MEIGS, *Clerk*,
By J. P. WILLIAMS,
Ass't Clerk.

Filed Feb. 4, 1875.

63 *Answer of Campbell.*

In the supreme court of the District of Columbia, this 18th day of February, 1875.

SAMUEL STRONG
vs.
CHARLES F. WILLEY, ROBERT CAMPBELL, et al. } Equity. No. 4144.

To the supreme court of the District of Columbia:

The seperate answer of Robert Campbell, one of the defendants, to the bill of complaint of complainant.

This defendant, for answer to said bill of complaint, or to so much thereof, as he is advised it is material for him to make answer unto, answering, says:

1st. This defendant admits the allegations contained in the 1st, 2d, & 3d paragraphs of complainant's said bill, and while knowing nothing about any representations made by said Willey to complainant as alleged in the 4th paragraph of said bill, admits so far as the equi-
64 ties of said bill effect this defendant that the averments in said

4th paragraph are true, excepting the allegation that there was an agreement that this defendant was to act as trustee for both said Willey and Strong.

There was nothing said in that regard, but has no objection to being considered as such trustee. As to said orders, he answers more fully hereafter.

2d. As to the allegations contained in the 5th paragraph, I say that I have heard said Willey represent that he had built one thousand and eighty-nine linear feet of said sewer, and since said Willey discontinued said work and had the same measured I have repeatedly heard said Strong admit that Willey had done that amount and that his and Willey's measurement came out to a foot. I have met said Strong several times nearly every week since said Willey discontinued said works and he never until the last few weeks intimated to me or in my pres-
65 ence that said Willey had not done all the work required to be done under his contract, and had done it well, excepting about a month after Willey claimed to have finished his work Strong complained that that part of the sewer built by Willey needed cleaning out, whereupon Willey at once employed men to and did clean the same out. There was no dispute thereafter until about six weeks after said cleaning, when said Strong insisted that said Willey should remove the surplus earth from the border of said sewer. I had before heard Strong say that a Mr. Childs was to take the clay therefrom. Nearly all the surplus earth was clay and good for brick making. I am a brick manufacturer by trade, and in that business. The clay was worth greatly more to a brick maker than it would cost to remove the entire surplus earth and fill up to grade the depression along the line of said sewer. As to any
66 false or fraudulent representations made by Willey in regard to said sewer I know nothing about them, or whether any were made. I do know there was no necessity for making any false statements, and if any were made they could easily have been detected by personal inspection. The sewer is large enough for a man to walk through upright.

3d. In answer to the 6th paragraph of said bill I say that I have no personal knowledge of the amount or number of orders given by said Strong to said Willey, but am advised and believe he gave said Willey but two orders, each for $3,000.00, on which he drew five thousand dollars in certificates from the Board of Public Works. Said Strong told me he gave Willey two such orders, and never pretended to have given him more. Said Strong has given me orders to the amount of $20,464.50 under the following circumstances, to wit: I have been furnishing said Willey brick until he had built about two hundred
67 lenear feet of said sewer, when he reported to me that said Strong threatened to take the contract from him, and I at once said that I would go upon his bond to complete the work. Willey up to this time had been pushing the work with great energy and had taken it after said Strong had ceased work thereon for several months during the best season of the year for doing such work. The brick makers had refused to sell said Strong brick, and I am quite certain he could not have purchased on credit at the time said Willey took said contract any considerable amount of brick from any manufacturer in the District. The brick makers' association had resolved before that not to give him credit for brick. I thereupon signed an undertaking that Willey would complete his contract, &c., and Strong then agreed to give me an order for $3,000 when each one hundred feet of said sewer was completed,

and sewer orders were given to me, the first one being for $2,464 50 (a fractional one of $535.50 having been given to H. W. Blunt) and six of $3,000 each, but none of those orders were given to me until each one hundred feet they represented was completed of said sewer and accepted by said Strong. He refused to give me any orders excepting as each one hundred feet was certified to by the District superintendent and he withheld the last four orders as I became entitled to them until, as he said, he had satisfied himself the work was done. This worked much delay in my getting said orders. On said orders I have received in certificates of the board of audit $8,464.50, and no more from any source in anything. These certificates (excepting $14.50, which I still hold) I passed over to defendant G. W. Balloch to convert into money to pay laborers who had worked on the sewer. I still hold hold $12,000 of said orders and no more. The indebtedness of said Willey will at least consume that entire amount. If said Strong will surrender my bond and release me from my obligation arising therefrom, and pay me what he admits said Willey owes me for brick furnished by me to construct said sewer, I will gladly surrender said orders. I have no copy of said bond and do not remember its exact provisions, but am advised by my solicitor that the following is a correct copy of my undertaking, to wit: "That if said Willey & Co. shall well and truly perform the said contract" (referring to the contract between said Willey & Strong for building said portion of said sewer) "and shall pay for the labor and material furnished for the same, then this bond shall be void and of no effect; but if said Willey & Co. shall not so pay for said labor and material or shall default in the building or construction of said sewer according to said contract, then and in that event I do hereby hold myself, my heirs, administrators, and assigns, for the payment of the same, to the extent of three thousand dollars."

In answer to the sixth paragraph of complainant's bill I say that my answer to the fifth paragraph contains all the knowledge or information I have in reference to its allegations.

In answer to the seventh paragraph I say in addition to what I have said in answer to complainant's fifth paragraph that said Willey built said sewer to within 30 feet of the point he was to carry it, when he was directed to stop by the engineer in charge in order to construct a "gravel pit." This portion was soon thereafter constructed by Gratts & Himber under contract, after advertisement with the board of commissioners. I am advised and believe that said Strong has never paid a dollar for material that entered into the construction of said sewer so built by Willey, and not paid or loaned him but ten dollars in money since he commenced said sewer. That as to the $175 for manhole tops for said sewer I say that sometime after said sewer was supposed to be completed, the engineer in charge required certain manhole tops to be placed, a part of which said Strong insisted belonged to Willey to furnish, and which Willey after considerable dispute consented might be furnished and taken out of his contract, and thereupon Strong undertook to furnish them, but advised me he had no money and could not raise the money to pay for them and the foundry would not make them for him on credit, but if I would endorse his note he could obtain them. On his assurance that there was nothing else in the way of a final settlement, I consented to and did give my promissory note therefor at fifteen days, and the tops were furnished and I paid the note, and took one from Strong therefor which has been over due several months and not paid and I still hold. I know nothing about

his responsibility in the sum of $150.00 for cleaning out said sewer. I do know Willey cleaned it out twice. As to $1,328.37 for hauling away dirt and rubbish left by said Willey I know that a considerable part of that was for removing dirt and rubbish from a part of the sewer not built by Willey, and I further know that said Willey had while building his part of said sewer an agreement with Isaac Childs, a brick maker near the same, & a responsible man, whereby the removal of said dirt and rubbish would not have cost Willey a hundred dollars, and I am advised by said Childs and believe that he would gladly have complied with that agreement, but was forbidden to do so by said Strong. I know the clay thrown out of the sewer was worth greatly more
73 to a brick maker so near it as was Mr. Childs than the cost of removing all the dirt and rubbish and filling said sewer to grade.

If the complainant means in the next section of said paragraph to say that there is charged up against him on said contract said sum in addition to the orders given by him to said Willey or this defendant, then I say it is not true. I received certificate to the amount of $8,464.50 from the board of audit on said orders by complainant, and endorsed said certificates to said defendant Balloch, to be converted into money to pay said laborers, and I am advised and believe he has faithfully performed that duty, and paid all due laborers, excepting about one hundred dollars due to four who have not been found and are reported not in the District.

As to the balance of said paragraph, I say that complainant has repeatedly stated to me since I executed said bond, that he had only given Willey two orders, which represented the two hundred feet
74 of said sewer completed by him, before said bond was required or given, and it was distinctly agreed between me and said Strong when said bond was given, and formed the consideration, that all orders to be thereafter given by him for work done on said sewer by Willey should be made payable and delivered to me, and that they should be so delivered as fast as sections of one hundred feet were completed. He has failed to do so.

I further say that, for the purpose of greater certainty, I caused statements to be made out both by the board of audit and the District government proper of the entire transactions of either Willey or this defendant in connections with said sewer, and file herewith four certificates representing in full those transactions. They are marked Exhibits R. C., Nos. 1, 2, 3, & 4. These certificates were obtained on the 16th & 17th of the current month. I know that Exhibit No. 1 states correctly and fully the amount I have drawn on orders of said Strong. I am informed and believe the others represent correctly
75 and fully the amount drawn by said Willey.

In answer to complainant' eighth paragraph, I say it is not true that I am endeavoring to induce the commissioners, or any one else, to pay laborers and employees of said Willey four thousand dollars, or any other sum. I am well advised and believe there is not, and was not at the time said paragraph was sworn to, one hundred dollars due such laborers or employees, and said Strong well knew that said defendant Balloch had much more in hand than enough to pay them in full, and, as I believe, was ready and willing to pay all entitled.

In answer to the ninth paragraph of said bill, I say that as to said Willey I am informed and believe that he has drawn on orders
76 of said complainant five thousand dollars, and no more, and I know that I have only drawn $8,464.50, which was appropriated

as aforesaid, making a total drawn by both said Willey and me of $13,464.50. I advised Strong of these facts but a few days before the filing of said bill, and repeatedly within the last few weeks, and he never questioned the accuracy of my statement, or expressed a doubt of their truthfulness. I have twelve thousand dollars more of said orders, which *which* I was endeavoring, until restrained by this court, to convert into certificates of the board of audit for the purpose of raising money to pay for material that entered into the construction of said sewer, and such other debts of said Willey as grew out of said work. I have no hesitation in saying that every creditor is desirous that I shall not be interfered with in that effort, and all the larger one' are not only desirous that I should so convert said orders, but are
77 aiding me to do so. I am advised by said board of audit that there is not due said Strong on said sewer, as found by said board, but about $, because he had overdrawn more than $20,000.00 on other contracts over a year ago, and it has since been charged against him. I am informed and believe that said Willey is not and has not for several months attempted to collect anything excepting to aid me in realizing on said orders. He relies upon his suit against said Strong heretofore brought in this court, involving his rights under said contract, and not upon any personal effort with the board of audit for relief. If I collect said orders as aforesaid there will be very little, if any *any* thing, left to pay Willey after paying (which I shall do if I collect them) his indebtedness growing out of said contract. I am informed by said Willey, and believe, there will be nothing left for him out of said orders.

In reply to the tenth paragraph, I say it is not true that I have
78 collected over $13,000.00, and say that I have only collected $8,464.50, and said Strong well knows that fact, and knows, too, that it was appropriated to payment of 1st, labor, 2d, for material.

As to complainant's eleventh paragraph, I say that I am not, and have not been, endeavoring to collect any thing to be given to said Willey, but only enough to pay his indebtedness contracted in executing said contract, and when that is done I shall make no further effort to collect under said contract, but shall sever all connection therewith or with the complainant. There is not the least ground, as I am informed and believe, for the averments in the plaintiff's bill that defendant Willey intends or ever intended to leave the District of Columbia without paying all his indebtedness. I know he has the entire confidence and good will of those who furnished him material, and this he
79 retains, notwithstanding I know as a fact that, during the entire period of six months past, said Strong has made determined and unflagging efforts to destroy his credit and defame his character.

I know nothing as to the twel'th paragraph of said bill, but am advised and believe that no such bond was ever given, and that said injunction order has not been dissolved, but still remains in force.

In answer to the 13th paragraph, I say that said certificates were placed in said Balloch's hands as a proper person to convert them into money and pay it out on checks. Exhibit R. C., No. 1, shows for what purpose said certificates were issued by the board of audit. They were delivered to said Balloch to execute that purpose. He has no further interest in said certificate on this suit.

And now, having fully answered, &c.

ROBERT CAMPBELL.

L. G. HINE,
Sol'r for Def't.

80 I, Robert Campbell, on oath, say that I have heard read the foregoing answer, by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and the facts therein stated on information and belief I believe to be true.

ROBERT CAMPBELL.

Sworn to and subscribed before me this 23d day of February, 1875.

R. J. MEIGS, *C.*,
By R. J. MEIGS, JR., *As't.*

Filed May 8, 1875.

81 *Exhibit* 1, *with Campbell's answer.*

OFFICE BOARD OF AUDIT,
COLUMBIA BUILDING, FOUR & A HALF STREET,
Washington, Feb'y 17, 1875.

The following certificates of the board of audit have been issued to Samuel Strong for use of Robert Campbell, on account of contract work on Boundary street sewer, dated August 1, 1874:

No. 10841, for the sum of	$3,000 00
" 10842, " " " "	3,000 00
" 10843, " " " "	2,450 00
" 10844, " " " "	14 50
Total	$8,464 50

Above issued on orders given by Strong to Campbell and to be used for the payment of laborers.

C. W. WATSON,
Secretary.

Filed May 8, 1875.

82 *Ex.* 2, *with Campbell's answer.*

WASHINGTON, *June* 11, 1874.

To the Board of Public Works:

Please pay to Messrs C. F. Willey & Co., or order, three thousand dollars, and charge to the account of work done under my contract to build the sewer on 15th and Boundary street northeast.

$3,000.00.

SAMUEL STRONG.

Received certificate No. 1781, June 16, 1874, for 2,000.00.

SAMUEL STRONG,
Per C. F. WILLEY & CO.,
Per C. F. WILLEY.

True copy.

C. W. WATSON,
Sec'y.

Filed May 8, 1875.

83 *Exhibit* 3, *with Campbell's answer.*

DISTRICT OF COLUMBIA,
COMPTROLLER'S OFFICE,
Washington, Feb. 6, 1875.

This is to certify that the pay-roll of Samuel Strong, for laborers,

amounts to the sum of seventeen hundred and seventy $\frac{23}{100}$, and same has been paid by this office.

F. COYLE,
Comptroller D. C.

Filed May 8, 1875.

84 *Exhibit 4, with Campbell's answer.*

On the 16th of June, 1874, Samuel Strong countermanded an order of three thousand dollars, payable to C. F. Willey & Co., dated June 11, 1874, until further orders.

Correct from the records.

C. W. WATSON,
Sec'ty Board of Audit.

Filed May 8, 1875.

85 *Willey's answer.*

In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } Equity. No. 4144.

The separate answer of defendant Charles F. Willey to the bill of complaint of the above-named complainant.

I. This defendant admits the correctness of the first, second, and third paragraphs of complainant's bill.

II. This defendant also admits that the complainant entered into said contract No. 774 with the late board of public works of the District of Columbia, for the performance of certain sewer work in said contract mentioned, and that about 6th of May, A. D. 1874, complainant sublet a portion of the work comprehended in said contract to this de-
86 fendant by name C. F. Willey & Co. at the price of $30.00 per linear foot; that is to say, about 1,000 linear feet of said sewer work was sublet to this defendant. He also admits that he agreed to perform said work in accordance with the contract between complainant and said board of public works, and to pay for all labor and material used on the same. He denies that he represented to complainant that he had for a partner a man of pecuniary means, or that on being pressed by complainant he confessed that he had no partner, as the same is alleged by complainant. He admits that his co-defendant, Robert Campbell, became a surety for him as alleged, and that at the time of giving such security it was agreed that said Campbell should receive orders given by complainant on account C. F. Willey & Co., but denies that said Campbell was to act as trustee as alleged, but took them for his protection.

87 III. In answer to the complainant's 5th paragraph he says that, pursuant to his said agreement with complainant, he entered upon the execution of the work comprehended therein and prosecuted the same diligently until he had completed 1,089 feet of said sewer and to a point whereby an order from Lieutenant Hoxey, engineer in charge of such work, the said Strong was required to stop said sewer. This was within thirty feet of the point to which said Strong claimed his contract extended, and was given, as stated by said Hoxey, to establish

"gravel pit" or trap to connect with a branch or latteral sewer. This space of thirty feet was built by Grotz & Himber, who constructed said branch or latteral sewer. It was part of their work and not of said Strong. I was prepared to build said thirty feet, and should without hesitation have done so if said engineer had not given an order
88 to stop, and claimed it was not in said Strong's contract. No officer of the District or general government ever to my knowledge or information found any fault with my part of said sewer, but all reported that my work and material was good and approved both. The contract of said Strong with the late board of public works and continued by the District commissioners was for thirty-nine dollars and fifty cents per linear food, and my contract with him was for thirty dollars per linear foot. My work measured 1,089 linear feet. Said Strong had my work measured and advised me that said measurement was correct. All my work was approved by the engineer, but I having three sections of said sewer to build and intermediate sections having been given to other sub contractors, the engineer measured all the work under complainant's contract, and did not and has not seperated my work from the work done by others for said Strong. The part of the sewer I constructed at $30 per linear foot amounted to $32,670.00.
89 Said Strong's orders credited for said part of said sewer by the board of audit $43,015.75.

In answer to the sixth paragraph, I say that I quit work on said sewer under said order on the 8th day of August, 1874 (excepting that thereafter I finished what I had commenced thereof, cleaned it out, &c., within a short time thereafter), and prior to that time I had received personally from said Strong two orders only, each for $3,000.00, and an order on my pay-roll, which amounted to $3,523.30, for which I gave said Strong my receipts. The first of said orders I surrendered to said Strong, and received from him certificates of the auditor of said late board for same amount, and I drew $2,000 of said certificates on the second of said orders. The said order on my pay-roll was honored only for $1,770.23, because it was made under the act of Congress
90 approved June 23d, 1874, and the commissioners decided they could pay under said act only that amount on said pay-roll. I never received on orders of said Strong but $5,000, which was in certificates, as aforesaid, and said sum of $1,770.23, paid by said commissioners on said pay-roll, making a total of $6,770.23. He never paid nor loaned me since I first talked with him about said contract but ten dollars, and that I am able to prove he owed me for work before then done. He never became responsible, so far as I have any knowledge, information, or belief, for a dollar's worth of material used by me, or labor employed by me, in building my part of said sewer, excepting when I had completed the third 100 linear feet of said sewer I gave an order of $535.50 on him in favor of H. W. Blunt, who had furnished me cement; this order said Strong accepted, and gave Blunt an
91 order on the late board of public works for, and deducted it from the next order. I (or rather defendant Campbell) became entitled to, and when I had performed my entire contract, as I believed, said Strong insisted that I should furnish man-hole tops to amount of $175, which I finally consented might be deducted from what was due me; and Strong thereupon undertook to supply them, but, being unable to pay for them or obtain them on credit, he obtained the promissory note of my co-defendant, Campbell, for that amount, and procured said traps. This was last October. Said Strong gave said Campbell a promissory note for the same amount, but has not paid

it, although overdue some months. I am not indebted to him for the use of any material, nor for any material furnished by him. This defendant denies that complainant has become responsible for the sum
92 of $1,328.37 for hauling away dirt and rubbish left about said sewer by this defendant, and which he was bound to him to remove. And, on the contrary, says that before he had ceased to work upon said sewer, for the reasons aforesaid, he made arrangements with one Isaac P. Childs, a brick manufacturer, whose brick kilns were in the immediate vicinity of said sewer, to take the surplus (earth and) clay about said sewer and use it about his said kilns, and repair the surface over said sewer with other earth and rubbish, which said Childs, with the permission of the late board of public works, commenced to do, and hauled thousands of loads of clay therefrom between the time he commenced the said work and the month of July, 1874, when said Childs was forbidden by said complainant from removing the said surplus clay; all of which will more fully appear, reference being
93 had to the affidavit of said Childs, herewith filed and marked Ex. C. F. W. & Co., No. 1.

And as to the sum of $5,082.36 cents alleged in said bill to have been ordered paid to laborers by the District Commissioners, I say that after repeated solicitation by this defendant and said Campbell, and notwithstanding the bitter and persistent opposition of said Strong and others acting for him, the board of audit about one month ago consented to, and did receive the orders said Strong had last summer given to said Campbell, amounting to $8,464.50, and issue certificates therefor payable to said Campbell. These certificates said Campbell at once passed to defendant Geo. W. Balloch to be converted into money, to pay, 1st, laborers; &, 2d, for material that entered into the construction of said sewer. Said Balloch immediately sold said certificates for $5,809.37, which he has used nearly all for that purpose, and all laborers
94 are paid excepting several who are believed to be out of the District. I do not owe one hundred dollars to laborers on said sewer.

This defendant says that it is not true that he or any one in his behalf has received, or that complainant has paid or accepted for or on account of this defendant, as C. F. Willey & Co. or as an individual, various sums of money aggregating the sum of $39,753.83; that complainant, as this defendant is informed and believes, has never accepted any order or become liable to pay any creditor of this defendant, as C. F. Willey & Co. or in his individual capacity, except the sum of $175 for "man-hole tops" aforesaid, and an order or acceptance in favor of one F. W. Blunt aforesaid for the sum of $535.50, dated about 22 June, 1874.

VI. In answer to the complainant's 9th paragraph, this defendant denies that he by name of C. F. Willey & Co. and his co defend-
95 ant Robert Campbell have collected or drawn upon orders given by complainant between 18 and $19,000, but he admits that he and said Robert Campbell are endeavoring to collect the balance of the orders of complainant now held by Campbell, amounting to the sum of $12,000.00, instead of between 14 and $15,000.00, as erroneously alleged, but denies that such action on their part is without regard to the fact that he and his co defendant Campbell had already been overpaid by complainant, and says that complainant's said allegation is false and without foundation. Should complainant mean, when he charges that defendant Campbell is endeavoring to collect said orders for the purpose of putting the proceeds into the hands of this defendant so that he may carry the same into the State of Tennessee, that this defendant

intends thereby to commit a fraud upon the rights of complainant, or of any person whomsoever, then this defendant says that said
96 charge is likewise false and without foundation.

VI. In answer to the complainant's 10th paragraph, this defendant says that his co-defendant, Robert Campbell, became a surety on his bond, required by complainant soon after the execution of said subcontract, guaranteeing the faithful performance of the contract; that at the time of the execution of said bond it was agreed, for the purpose of protecting this defendant and his surety—said defendant, Robert Campbell—that complainant should, as fast as a section of said sewer 100 feet in length should be completed by this defendant, give to my co-defendant Campbell an order upon the late board of public works of the D. C. for the sum of $3,000.00 (each), pursuant to such arrangement which was between me and my co defendant Campbell.

Complainant delivered said orders as follows:

97

On the	29th	May,	1874,	orders	on	B.	P.	W.	D. C.. $3,000 00
" "	11	June,	"	"	"	"	"	"	.. 3,000 00
" "	22	"	"	"	"	"	"	"	.. 2,464 50
" "	27	"	"	"	"	"	"	"	.. 3,000 00
" "	3	July,	"	"	"	"	"	"	.. 3,000 00
" "	15	"	"	"	"	"	"	"	.. 3,000 00
" "	5	August,	"	"	"	"	"	"	.. 3,000 00
" "	20	"	"	"	"	"	"	"	.. 3,000 00

Making a total of $23,464 50

Said orders were in the following form:

WASHINGTON, D. C., 1874.

To the Board of Public Works:

Pay to the order of Robert Campbell and charge the same to my account.

(Signed) SAMUEL STRONG.

And during the administration of said board of public works were recognized as valid assignments for the amounts they represented; that in consequence of complainant's interference the board of audit of said District refused to recognize said orders, which were consequently returned to him, but have since been submitted to the board of audit.

This defendant denies that he and his co-defendant Campbell have
98 collected under the agreement aforesaid over $13,000.00, but say the correct amount collected is $8,464.50 in certificates or orders given to said Campbell, and $5,000 on orders to this defendant, which last amount was received before said agreement with Campbell. So far as complainant's charges that defendant Robert Campbell has never paid any of the bills for material and labor, &c., this defendant says that said Campbell was not required to pay said bills, or any of them, excepting as required in his said bond, to complainant; and so far as said Campbell's refusing to pay said bills is concerned, this defendant says not one of his creditors, as he is informed and believes, has ever asked said Campbell to pay the same.

VII. In answer to complainant's 11th paragraph, this defendant says that the correct amount which defendant Campbell is endeavoring to collect (before the board of audit) is $12,000.00, being the amount
99 represented by four of the aforesaid orders (of complainant), dated respectively , instead of the sum of $10,953.83, as

alleged by complainant; defendant says that said fund, when collected, will be used by him and the said Campbell in paying those to whom this defendant is indebted for materials used in the construction of said sewer. So far as the complainant charges that my co-defendant Campbell is endeavoring to collect said money and place the same in my hands, in order to enable me to depart the jurisdiction of this court without making provision for the payment of money alleged to be due complainant from this defendant, I say that I am not indebted to complainant in any sum whatever, but that the complainant is indebted to me in the sum of $16,899.93, unless the orders aforesaid, now be-
100 fore the board of audit, shall be considered payment; in which event he is indebted to me in the sum $4,899.93.

VIII. In answer to the complainant's 12th paragraph, this defendant says that so far as the allegations therein contained refer to him or affect his interest, are concerned, he asks leave to read such of the proceedings and Exhibits in equity cause No. 3904 of this honorable court, in which this defendant is complainant and the said Samuel Strong et al. are defendants, as may be pertinent in answer to said paragraph. So far as the charge that complainant gave defendant William Lilley an order for certificate' to the amount of $6,000.00, which said Lilley was to hold for the security of said H. S. Johnston, who went upon the bond of complainant upon the allowing of the injunction in the equity cause above referred to is concerned, this defendant has no knowledge, but believes the version thereof given by complainant to be untrue.

101 IX. In answer to the complainant's 13th paragraph, this defendant denies that defendant George W. Balloch acted or is acting a trustee for this defendant, as C. F. Willey & Co., or of my co-defendand Robert Campbell, but on the contrary says, as I have before stated in the paragraph of this answer, that said Balloch, so far as this defendant has any knowledge, represented certain laborer' who had been employed by this defendant as aforesaid, and has no other interest in this suit or said contract.

For further answer, I say that I have not a creditor who has advised me, or whom I believe looks to said Strong for payment.

My account with said Strong, ⅌ of building said sewer, is as follows:

Samuel Strong to Chas. F. Willey.

For constructing 1,089 linear feet of Boundary & 15th st. sewer, @ $30 per foot	$32,670 00

CR.

By certificate to self on his orders	$5,000 00
102 By certificates of b'd of audit issued to Robert Campbell on your orders to him	$8,464 50
By order in favor of H. W. Blunt	535 50
" am't p'd by Controller D. C. on pay-roll, as per order of Strong (the order was for $3,523.30), on which was p'd	$1,770 23
Bal. due Willey, including remaining $12,000 in orders given by said Strong	$16,899 77

And now having fully answered, &c.

C. F. WILLEY.

L. G. HINE,
Sol'r for Def't.

I, Charles F. Willey, on oath say that I have heard read the foregoing answer by me subscribed, and know the contents thereof, and that the facts therein stated on my personal knowledge are true, and that those facts stated on information and belief I believe to be true.

C. F. WILLEY.

103 Sworn to and subscribed before me this 23d day of February, 1875.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk*.

Filed May 8, 1875.

104 *Answer of def't Lilley.*

In the supreme court of the District of Columbia, the 19th day of February, A. D. 1875. In equity.

SAMUEL STRONG, COMPLAINANT, *vs.* W. LILLEY ET AL., DEFENDANT. } No. 4144.

In answer to the said bill of complainant, I say as follows:

1. It is true that the complainant and this defendant are both residents of the District of Columbia.

2. It is true that the complainant did execute and deliver to this defendant an order on the board of audit for certificates to the amount of six thousand dollars. But I deny that the consideration for such order is correctly stated in paragraph twelve of complainant's bill.

105 3. I aver that the following are the facts in connection with that transaction, to wit: That the complainant did execute and give to this defendant an order on the board of audit for six thousand dollars, as aforesaid; that the said order was given to this defendant to secure H. S. Johnston against any loss he might sustain by reason of having signed a bond for said complainant, and also to secure the payment of two hundred dollars for which the said Johnston held and still holds the due bill of this complainant; that no part of said two hundred dollars has been paid, as this defendant is informed and believes; that the said Johnston holds this defendant for the same.

4. That when the action of the court rendered the above-named
106 bond void, this defendant offered to relinquish the said order to this complainant if he would provide for the payment of the aforesaid two hundred dollars.

5. It was then agreed that this defendant should prosecute the aforesaid order to payment, and when the certificates were issued this defendant was to apply the proceeds as follows: 1st. To the payment of the above two hundred dollars. 2nd. To pay to Leonard Huych the amount this complainant owed him. 3d. To pay to this defendant the amount of his fees for services rendered to this complainant.

6. That the sum due to this defendant was fifteen hundred dollars in money, or twenty-one hundred dollars in certificates.

7. This defendant was also to pay a bill for printing, from this
107 complainant, and for which this defendant had become liable, amounting to forty-two dollars and fifty cents in money, or sixty dollars in certificates.

8. That the said Huych claims there is due him four thousand one hundred and fifty-six dollars and fifty cents (4,156.50).

9. That these several amounts aggregate the sum of six thousand six hundred and fifty-six dollars and fifty cents (6,656.50), or six hundred and fifty-six dollars and fifty cents in excess of the order on the board of audit which this complainant gave to this defendant.

10. This defendant admits that he held and now holds said order, in trust, for the benefit of the persons above named, and he avers that he does this by the express direction of this complainant. This de-
108 fendant further avers that in consequence of this agreement a responsibility was forced on this defendant which he cannot now honestly abandon, as is proved by the affidavits filed in support of this answer.

11. That if the amount due to this defendant be paid, and he further released from the responsibility for the amount due to others, he is ready and willing to return the above-named order on the board of audit.

12. That this defendant, acting in good faith as trustee aforesaid, insists upon the said trust being honestly carried out. To that end he prays that said injunction be dissolved, and he permitted to go and collect said order and have such other relief as may be found equitable.

W. LILLEY.

109 I do solemnly swear that I have read the answer by me subscribed and know the contents thereof, and that the facts stated upon my personal knowledge are true, and that the facts stated on information and belief I believe to be true.

W. LILLEY.

Sworn and subscribed before me this 19th day of February, A. D. 1875.

R. J. MEIGS, *Clerk*,
By J. P. WILLIAMS,
Ass't Clerk.

Filed April 13, 1875.

110 *Agreement to Refer to W. B. Webb.*

In the supreme court of the District of Columbia this 5th day of May, 1875.

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity No. 3904.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } Equity No. 4144.

Matters of difference having arising between Samuel Strong and Charles F. Willey, and the parties being desirous of a speedy and final adjustment and settlement of all such matters as are referred to or included in the bills of complaint in the above entitled cause have agreed and hereby do agree that all such matters may be referred to the arbitrament of William B. Webb, of Washington City, D. C., whose
111 decision shall be final and conclusive between the parties, and he shall have full power to take such testimony as either party may produce before him, and his decision upon any and all questions that may arise during his investigation of said causes shall be final and conclu-

sive, and the final decree of the court may be based upon his report when made, and no exception thereto shall be made by either party.

In witness whereof we have hereunto set our hands and seal this 5th day of May, 1875.

C. F. WILLEY. [SEAL.]
SAMUEL STRONG. [SEAL.]
CHARLES F. WILLEY. [SEAL.]

Witness:
L. G. HINE,
Att'y for Cha's F. Willey.

112 In the supreme court of the District of Columbia, this 7th day of May, 1875.

CHARLES F. WILLEY *vs.* SAMUEL STRONG ET AL. } Equity No. 3904.

SAMUEL STRONG *vs.* CHARLES F. WILLEY ET AL. } Equity No. 4144.

The motion of said Charles F. Willey, by his counsel, coming on to be heard, to appoint William B. Webb as referee in the above-entitled causes, and the stipulation of the parties thereto this day filed having been read and duly considered, it is this 7th day of May, 1875, ordered that said causes be referred to William B. Webb as referee, to report to the court for its final action in accordance with the stipulation of the parties this day filed.

By the court.

Filed May 7, 1875.

113 *Award.*

In the supreme court of the Dist. of Col.

CHARLES F. WILLEY *vs.* SAMUEL STRONG ET AL. } Equity No. 3904.

SAMUEL STRONG *vs.* CHARLES F. WILLEY ET AL. } Equity No. 4144.

Report of referee.

The above cases were referred to me by agreement of parties, and an order of court made in conformity with that agreement. By the agreement and order all the matters of difference arising between the said Willey and Strong which are referred to and included in the bills of complaint in the above-named causes are referred to my arbitra-
114 ment, and full power is given me to hear such testimony as either party may produce before me, and my decision upon the said matters of difference is made final.

It is not necessary for me to state here what these matters of difference are, they are so fully set forth in the pleadings, and I shall content myself with stating my conclusions. A great deal of testimony was adduced before me by both parties, which I have heard and considered as patiently and carefully as it lay in my power to do, and I have reached the following conclusions:

First. I am satisfied that Willey commenced the construction of the portion of the Boundary street sewer built by him under his subcontract
115 with Strong at a point about thirty feet east of the I street manhole, and from that point to the place where he was compelled to stop work by the District authorities that he built one thousand and eighty-nine linear feet.

Second. I am satisfied that Willey under the terms of his subcontract was obliged to complete the sewer entirely, and that in this was included the cleaning out of the sewer, the filling up of the putlog holes, the leveling of the top of the sewer, or rather of the street that passed along and over it, and the completing and covering of the manholes. I think the testimony shows that Willey did clear out the portion of the sewer built by him and I have accordingly made no charge against him for that. The putlog holes were filled by Bryant under Strong's
116 employment, and I have allowed what Bryant says it cost to have that work done. With respect to the filling up or levelling of the street over the sewer, I have had some difficulty in concluding what should be a proper allowance for the work done, but I have concluded to take W. Edwards' figures; have charged Mr. Willey with what I find to be his proportion of the amount contracted to be paid by Strong for that work, and I have also charged him with the cost of the manhole covers, which is to be paid to Mr. Campbell.

Third. I have concluded that Mr. Strong is entitled to something for the use of his tools and for the lumber and scaffolding used in the construction of the sewer, and I have accordingly, after duly consider-
117 ing all the testimony on that point, made such an allowance as I think is fair.

I annex a schedule in account in which I have set out in detail the allowances and charges that appear to me to be correct. This account shows that I find Mr. Strong indebted to Mr. Willey in the sum of fifteen thousand four hundred and thirteen dollars and twenty-one cents (15,413.21), and I accordingly award that sum to Willey with costs.

1,089 feet of sewer, at $30 per foot			$32,670 00
Amt. paid on pay-rolls	$1,770 23		
Amt. " ord'r to Blunt	535 50		
Amt. " putlog holes	24 00		
Amt. " levelling	987 50		
Amt. " for manhole covers	175 00		
		3,492 23	
		$29,177 77	
Payments:			
Certificates to Willey	$5,000		
" to Campbell	8,464 56		
		13,464 56	
118 Balance due Willey		$15,713 21	
Allowance for use of tools		300	
		$15,413 21	

Dec. 7, 1875.

W. B. WEBB,
Referee.

Referee's fee, $300.

Filed Dec. 7, 1875.

119 *Motion for judgment on award.*

In the supreme court of the District of Columbia, Dec. 8th, 1875.

WILLEY
vs.
STRONG ET AL. } Eq. No. 3904.

STRONG
vs.
WILLEY ET AL. } Eq. No. 4144.

The complainant, Chas. F. Willey, in said cause No. 3904, and defendant, Willey, in said cause No. 4144, move the court for final decree upon the report of W. B. Webb, referee in said cause.

L. G. HINE,
Sol'r for Willey.

Filed Dec. 8, 1875.

120 *Decree on award.*

In the supreme court of the District of Columbia, January special term, A. D. 1876.

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } 3904. Eq.

and

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } 4144. Eq.

The above causes came on to be heard at this term upon exceptions filed by Samuel Strong on the 10th day of December, A. D. 1875, to the award of W. B. Webb, esq., referee, to whom the said causes stood referred by an order passed therein on the 7th day of May, A. D. 1875, and the same having been argued by counsel, it is thereupon, this 14th day of January, A. D. 1876, ordered, adjudged, and decreed that
121 said exceptions be, and the same are hereby, overruled, and that the said award be, and is hereby, approved, ratified, and confirmed. And it is hereby further ordered and adjudged and decreed that Charles F. Willey recover against said Samuel Strong the sum of fifteen thousand four hundred and thirteen dollars and twenty-one cents (15,413.21), the sum awarded by said referee, and the costs and expenses incurred in said causes, and that he have execution thereof as at law.

By the court.

A. WYLIE.

Filed Jan. 14, 1876.

122 *Bill of review.*

In the supreme court of the District of Columbia.

CHARLES F. WILLEY
vs.
SAMUEL STRONG, ROBERT W. TAYLOR, JOHN M. Broadhead. } Equity. No. 3903.

The bill of review of Samuel Strong, one of the defendants in the above-entitled cause.

Samuel Strong, by this his bill of review, respectfully shows to the court as follows, to wit:

First. The above-named Charles F. Willey exhibited his original bill of complaint in this court on the 7th day of September, 1874, against your orator and the other defendants therein, and thereby set fourth that your on or about the 19th day of July, 1873, obtained
123 from the board of public works of the District of Columbia a contract to construct a sewer along Fifteenth and Boundary streets, in the city of Washington, and being unable, by reason of want of money or credit, to perform said contract, sublet a portion of the same to the said Willey in the name of C. F. Willey & Co., by a contract in writing in the words and figures following, to wit:

This agreement, made and concluded this sixth day of May, A. D. 1874, by and between Samuel Strong, of the first part, C. F. Willey & Co., of the second part, witnesseth:

That the said Strong hereby agrees to employ the said C. F. Willey & Co. to build and finish the sewer on 15th and Boundary streets, in the city of Washington, according to the specifications contained
124 in the contract duly executed by the said Strong with the board of public works.

The said C. F. Willey & Co. to furnish all material and pay for all labor in construction thereof.

The said Strong hereby agrees to pay the said C. F. Willey & Co. the sum of thirty dollars per lineal foot, the same to be paid *[in orders of the said Strong on the board of public works, payable in sewer bonds; the said orders to be paid] and delivered to the said C. F. Willey & Co. as fast as they completed each one hundred feet of said sewer.

The said C. F. Willey & Co. hereby agree to complete and finish the said sewer according to the specifications in ninety days from the date hereof.

It is further agreed that all payments shall be made upon the
125 certificates of the inspectors of the board of public works that the work has been done according to contract.

The said Strong further agrees that if the board of public works shall elect to pay his said orders in money or other securities acceptable to said Willey & Co., they shall be entitled to any benefit arising therefrom.

In testimony whereof the said parties have hereunto affixed their hands a' seals the day and year hereinbefore written.

SAMUEL STRONG. [SEAL.]
C. F. WILLEY & CO. [SEAL.]

Witness:
L. HUYCK.

* The words in brackets were omitted in the original bill.

And that said Willey at once proceeded to furnish the material and perform the labor contemplated thereby; and that on the 8th day of Au-
126 gust, 1874, he completed the same, and that on the 26th day of August, 1874, a final measurement of his work was made and the same accepted by the District of Columbia. That he furnished the ma t e r a and performed the labor in the construction of 1,089 feet of said sewer, and thereupon this defendant or the District of Columbia became indebted to the said Willey in the sum of $32,670.00. That for said work and material he had received from this defendant or orders on the board of public works and certificates of indebtedness to the amount of $5,000.00 and nothing more, leaving a balance due him of $27,670.00. That about the time of the making of said agreement with your orator, he was required to and did give a bond, with Robert Campbell as surety, for the faithful performance of said contract, and that thereupon
127 it was agreed that, for the protection of the said Campbell, your orator should give to said Campbell an order upon the board of public works for the sum of $3,000.00 for each one hundred lineal feet of said sewer, so soon as said number of feet should be completed, and that in part performance of the last mentioned agreement, your orator did give to said Campbell (from May to August, 1874) orders on the board of public works aggregating $20,446.00, and that your orator had given other orders amounting to $6,535.00, leaving a balance due to said Willey for the said work and materials of $5,689.00, and that your orator has refused to give orders for such balance. That the orders so given by your orator were filed with the officers or agents
128 of the District of Columbia, and that the board of public works always recognized them as valid assignment of the amount they represented, but that your orator was urging the board of audit, composed of the defendant Taylor and Brodhead, to settle directly with him, and ignore said orders, and that said board of audit had advised said Willey that they had no time to adjust conflicting claims and to apply to this court for relief. That all of said orders, excepting one for $535.00, have been returned to him, said Willey, in consequence of the premises, and that Strong is insolvent; that complainant was indebted for work and materials and would be utterly unable to pay unless he could obtain a specific perform
129 ance of his contract. That this defendant was about to, and would unless restrained by this court, obtain a certificate from the board of audit for the entire indebtedness for constructing said sewer, and that he intends to sell the same, in order to cheat and defraud said Willey. And the complainant in said cause prayed in his said bill that your orator might be restrained from interfering with the board of audit in the settlement for work done and materials furnished for said sewer by said Willey, and particularly from asking or receiving from said board of audit or other officer any certificate, bond, order, evidence of indebtedness, or statement of account for the work
130 done by said Willey under the said agreement, and that a specific performance might be ordered of said agreement between your orator and said complainant, and that a receiver might be appointed.

Second. And your orator having been served with proper process for that purpose appeared and put in his answer to said to effect following; that is to say, that the complainant had a full and complete remedy at law; that it was true that he had a contract with the board of public works as alleged, but untrue that he sub-let the work because of his want of money or credit. Said answer admits the making of the contract with

122 *Bill of review.*

In the supreme court of the District of Columbia.

CHARLES F. WILLEY
vs.
SAMUEL STRONG, ROBERT W. TAYLOR, JOHN M. Broadhead. } Equity. No. 3903.

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123 from the board of public works of the District of Columbia a contract to construct a sewer along Fifteenth and Boundary streets, in the city of Washington, and being unable, by reason of want of money or credit, to perform said contract, sublet a portion of the same to the said Willey in the name of C. F. Willey & Co., by a contract in writing in the words and figures following, to wit:

This agreement, made and concluded this sixth day of May, A. D. 1874, by and between Samuel Strong, of the first part, C. F. Willey & Co., of the second part, witnesseth:

That the said Strong hereby agrees to employ the said C. F. Willey & Co. to build and finish the sewer on 15th and Boundary streets, in the city of Washington, according to the specifications contained
124 in the contract duly executed by the said Strong with the board of public works.

The said C. F. Willey & Co. to furnish all material and pay for all labor in construction thereof.

The said Strong hereby agrees to pay the said C. F. Willey & Co. the sum of thirty dollars per lineal foot, the same to be paid *[in orders of the said Strong on the board of public works, payable in sewer bonds; the said orders to be paid] and delivered to the said C. F. Willey & Co. as fast as they completed each one hundred feet of said sewer.

The said C. F. Willey & Co. hereby agree to complete and finish the said sewer according to the specifications in ninety days from the date hereof.

It is further agreed that all payments shall be made upon the
125 certificates of the inspectors of the board of public works that the work has been done according to contract.

The said Strong further agrees that if the board of public works shall elect to pay his said orders in money or other securities acceptable to said Willey & Co., they shall be entitled to any benefit arising therefrom.

In testimony whereof the said parties have hereunto affixed their hands a' seals the day and year hereinbefore written.

SAMUEL STRONG. [SEAL.]
C. F. WILLEY & CO. [SEAL.]

Witness:
L. HUYCK.

* The words in brackets were omitted in the original bill.

And that said Willey at once proceeded to furnish the material and perform the labor contemplated thereby; and that on the 8th day of Au-
126 gust, 1874, he completed the same, and that on the 26th day of August, 1874, a final measurement of his work was made and the same accepted by the District of Columbia. That he furnished the ma t e r a and performed the labor in the construction of 1,089 feet of said sewer, and thereupon this defendant or the District of Columbia became indebted to the said Willey in the sum of $32,670.00. That for said work and material he had received from this defendant or orders on the board of public works and certificates of indebtedness to the amount of $5,000.00 and nothing more, leaving a balance due him of $27,670.00. That about the time of the making of said agreement with your orator, he was required to and did give a bond, with Robert Campbell as surety, for the faithful performance of said contract, and that thereupon
127 it was agreed that, for the protection of the said Campbell, your orator should give to said Campbell an order upon the board of public works for the sum of $3,000.00 for each one hundred lineal feet of said sewer, so soon as said number of feet should be completed, and that in part performance of the last mentioned agreement, your orator did give to said Campbell (from May to August, 1874) orders on the board of public works aggregating $20,446.00, and that your orator had given other orders amounting to $6,535.00, leaving a balance due to said Willey for the said work and materials of $5,689.00, and that your orator has refused to give orders for such balance. That the orders so given by your orator were filed with the officers or agents
128 of the District of Columbia, and that the board of public works always recognized them as valid assignment of the amount they represented, but that your orator was urging the board of audit, composed of the defendant Taylor and Brodhead, to settle directly with him, and ignore said orders, and that said board of audit had advised said Willey that they had no time to adjust conflicting claims and to apply to this court for relief. That all of said orders, excepting one for $535.00, have been returned to him, said Willey, in consequence of the premises, and that Strong is insolvent; that complainant was indebted for work and materials and would be utterly unable to pay unless he could obtain a specific perform
129 ance of his contract. That this defendant was about to, and would unless restrained by this court, obtain a certificate from the board of audit for the entire indebtedness for constructing said sewer, and that he intends to sell the same, in order to cheat and defraud said Willey. And the complainant in said cause prayed in his said bill that your orator might be restrained from interfering with the board of audit in the settlement for work done and materials furnished for said sewer by said Willey, and particularly from asking or receiving from said board of audit or other officer any certificate, bond, order, evidence of indebtedness, or statement of account for the work
130 done by said Willey under the said agreement, and that a specific performance might be ordered of said agreement between your orator and said complainant, and that a receiver might be appointed.

Second. And your orator having been served with proper process for that purpose appeared and put in his answer to said to effect following; that is to say, that the complainant had a full and complete remedy at law; that it was true that he had a contract with the board of public works as alleged, but untrue that he sub-let the work because of his want of money or credit. Said answer admits the making of the contract with

Willey referred to in the said bill, but alleges that the second paragraph of the contract as set out in the said bill of complaint is
131 garbled, and states the contract as it really was written; that is to say, by inserting after the word "paid" where it first occurs in the contract, as set out in the bill, the words "in orders of the said Strong on the board of public works, payable in sewer bonds, the said orders to be paid." That your orator, up to the 20th day of August, 1874, had made and delivered to said Willey, for work and materials in said sewer in pursuance of the said agreement, orders on the board of public works amounting to $35,523.30, and denies that there is a balance due to Willey of $5,689.00; and also that your orator has refused to give an order for said balance. He avers that no final measure-
132 ment of the work had been made as required by the said agreement. That at the request of the said Willey, on the 17th day of July, 1874, he gave an order on the Commissioners of the District of Columbia to pay to the laborers of said Willey $3,523.30, thus giving the said Willey the advantage of cash instead of "sewer bonds," and saving for him *for* sixteen to eighteen hundred dollars, for which no consideration has been given or paid. He denies that Willey completed the sewer, and avers that Willey refused to complete it, and that he was compelled to employ men and complete it himself; and he alleges that when he shall be advised of the final measuremant of the sewer, he will be ready to give any order that may be found due under the
133 contract. That the said Willey refused to clean out that part of the sewer by him constructed, although requested so to do, and that the defendant has employed men who were doing said work. That the said Willey falsely stated to him at the time the said contract was made that one Clements and one McAnally were his partners, and that such partners had $3,000 to put into said work, and charges that the allegation of the said bill that he knew that the complainant had no partners is false. He denies that he ever, by attorney or otherwise, endeavored to induce the board of audit to ignore any of his orders, and denies that the said orders were returned to the complainant on
134 account of any interference on his part; and avers that the charge that he is insolvent is utterly false and malicious.

Third. Issue was joined upon the said answer, whereupon an agreement was made in the words and figures following, to wit:

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity. No. 3904.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } Equity No. 4144.

Matters of difference having arisen between Samuel Strong and Charles F. Willey, and the parties be desirous of a speedy and final adjustment and settlement of all such matters as are referred to or included in this bill of complaint in the above entitled cause, have agreed and
135 hereby do agree that all such matters may be referred to the arbitrament of William B. Webb, of Washington City, D. C., whose decision shall be final and conclusive between the parties; and he shall have full power to take such testimony as either party may produce before him, and his decision upon any and all questions that may arise during this investigation of said cause shall be final and con-

clusive, and the final decree of the court may be based upon his report when made, and no exceptions thereto shall be made by either party.

In witness whereof we have hereunto set our hands and seals this 5th day of May, 1875.

C. F. WILLEY. [SEAL.]
SAMUEL STRONG. [SEAL.]
CHARLES F. WILLEY & CO. [SEAL.]

Witness:
L. G. HINE,
Att'y for Chas. F. Willey.

136 And upon said stipulation the court, on the 7th day of May, 1875, made and entered the following order; that is to say—

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity. No. 3904.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL } Equity. No. 4144.

The motion of said Charles F. Willey, by his counsel, coming on to be heard to appoint William B. Webb as referee in the above entitled causes, and the stipulation of the parties thereto, this day filed, having been read and duly considered, it is this 7th day of May, 1875,

Ordered, That said causes be referred to William B. Webb, as
137 referee, to report to the court for its final action, in accordance with the stipulation of the parties this day filed.

By the court.

Afterwards, by consent, your orator filed an amendment to his said answer, in which he averred that said Willey had completed 758 feet of said sewer and not more.

And the said referee then proceeded to hear the testimony of the parties, and, the proofs being closed, he submitted the following report, on the 7th day of December, 1875, to wit:

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity. No. 3904.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } Equity. No. 4144.

Report of referee.

The above causes were referred to me by agreement of parties,
138 and an order of court made in conformity with that agreement.

By the agreement and order all the matters of difference arising between the said Willey and Strong, which are referred to and included in the bills of complaint in the above-named causes, are referred to my arbitrament, and full power is given to me to hear such testimony as

either party may produce before me, and my decision upon the said matters of difference is made final.

It is not necessary for me to state her' what these matters of difference are, they are so fully set forth in the pleadings; and I shall content myself with stating my conclusions.

A great deal of testimony was adduced before me by both parties, which I have heard and considered as patiently and carefully
139 as lay in my power to be, and I have reached the following conclusions:

First. I am satisfied that Willey commenced the construction of the portion of the Boundary street sewer built by him under his sub-contract with Strong at a point about thirty feet east of the I street manhole, and from that point to the place where he was compelled to stop work by the district authorities; that he built one thousand and eighty-nine *lea*near feet.

Second. I am satisfied that Willey, under the terms of his sub-contract, was obliged to complete the sewer entirely, and that in this was included the cleaning out of the sewer, the filling up of the put log
140 holes, levelling of the top of the sewer, or rather of the street that passed along and over it, and the completing and covering of the manholes. I think the testimony shows that Willey did clean out the portion of the sewer built by him, and I have accordingly made no charge against him for that. The put log holes were filled by Bryant, under Strong's employment, and I have allowed what Bryant says it cost to have that work done.

With respect to the filling up or levelling of the street over the sewer, I have had some difficulty in concluding what should be a proper allowance for the work done, but I have concluded to take Mr. Edwards' figures, and have charged Mr. Willey with what I find to be his
141 proportion of the amount contracted to be paid by Strong for that work, and I have also charged him with the cost of the man-hole covers, which is to be paid to Mr. Campbell.

Third. I have concluded that Mr. Strong is entitled to something for the use of his tools, and for the lumber and scaffolding used in the construction of the sewer, and I have accordingly, after duly considering all the testimony on that point, made such an allowance as I think is fair.

I annex a schedule or account, in which I have set out in detail the allowances and charges that appear to me to be correct. This account shows that I find Mr. Strong indebted to Mr. Willey in the sum
142 of fifteen thousand four hundred and thirteen dollars and twenty-one cents (15,413.21), and I accordingly award that sum to Mr. Willey with costs.

1,089 feet of sewer, at $30 per foot			$32,670 00
Am't paid on pay-roll	$1,770 20		
Am't " order to Blunt	535 50		
Am't " put log holes	24 00		
Am't " levelling	987 50		
Am't " for man-hole covers	175 00		
		3,492 23	
			$29,177 77

Payments:

Certificates to Willey	$5,000	
" to Campbell	8,464 56	
		13,464 56
Balance due Willey		$15,713 21
Allowance for use of tools		300
		15,413 21

W. B. WEBB, *Referee.*

December 7, 1875.

Referee's fee, $300.

Fourth. To the said report of the referee your orator filed exceptions, which on the 14th day of January, 1876, were argued by counsel, and this court thereupon made and entered a decree in the words and figures following, to wit:

143

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } 3904. Eq.

and

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } 4144. Eq.

The above causes came on to be heard at this term, upon exceptions filed by Samuel Strong on the 10th day of December, A. D. 1875, to the award of W. B. Webb, esq., to whom the said causes stood referred by an order passed therein on the 7th day of May, A. D. 1875, and the same having been argued by counsel, it is thereupon, this 14th

144 day of January, A. D. 1876, ordered, adjudged, and decreed that said exceptions be and the same are overruled, and that the said award be and is hereby approved, ratified, and confirmed. And it is hereby further ordered, adjudged, and decreed that Charles F. Willey do recover against said Samuel Strong the sum of fifteen thousand four hundred and thirteen dollars and twenty one cents ($15,413.21), the sum awarded by said referee, and the costs and expenses incurred in said causes, and that he have execution thereof as at law.

By the court.

A. WYLIE.

And this decree this defendant insists is erroneous and ought to be reviewed, revised, and set aside for many apparent errors and im-

145 perfections, inasmuch as it appears from the pleadings and exhibits, and the report of the referee, and the decree made and grounded thereon—

1. That the said Willey, for the cause set forth in his said bill of complaint, had a full, adequate, and perfect remedy at law, and that said bill ought to have been dismissed.

2. That the said Willey was to furnish the materials and perform the labor in the construction of said sewer for the sum of $30.00 per linear foot, and that said compensation was to be paid to him by Strong in

orders on the board of public works, payable in sewer bonds; and that said Willey constructed 1,089 linear feet of said sewer, which, at $30 per linear foot, amounts to $32,670.00, payable in sewer bonds;
146 and that Willey did not entirely finish said sewer, but left a part thereof unfinished, which said Strong completed; and that said Willey had received from Strong orders on the board of public works, drawn by Strong, for the sum of $26,981.00, in payment of such work and materials, and that said Willey was chargeable also with money paid by Strong for him, and in the completion of work which Willey should have done, the additional sum of $3,792.23, the payments amounting in the aggregate to the sum of $30,773.23, paid to Willey on account of the said work and materials. And the said award of the said referee and the said decree, notwithstanding these payments, finds and recites that there is due from your orator to said Willey the
147 sum of $15,413.23, on account of the said work done and materials furnished by said Willey on said sewer under said contract, and said decree renders judgment therefor accordingly and awards execution therefor, as at law, against your orator in favor of said Willey for said sum. And no proof being made thereof, and the said Willey, in his said bill of complaint, claiming that there was due to him on account of the premises only $4,899.93, no such decree ought to have been made or grounded on said proceedings.

Fifth. The said board of audit composed of the said Taylor and Brodhead has been abolished or discontinued, and the said parties have no further interest in these proceedings.

Sixth. That the officers of the District of Columbia, against
148 the instructions and orders of your orator, have made a pretended settlement of all the accounts of your orator with said District, on account of the work done and materials furnished in the construction of the said Boundary street sewer, and also on account of work done and materials furnished by him for said District several other sewers and public improvements, and pretend that there is due to him only the sum of $10,102.00. For this sum the board of audit has issued a certificate without the knowledge or consent of your orator, and have filed the same in this cause, with the clerk of this court, without your orator's consent or approbation, where the same now remains. But your orator avers that there is a large sum of money, over and above the amount of said certificate, due to him from the District
149 of Columbia on account of such work and materials.

Your orator has paid no part of the said judgment so rendered against him and in favor of said Willey and hereinbefore mentioned, and he avers that he is not now, and has not been since said judgment was rendered, able to pay the same. He further avers that the said Willey is utterly insolvent, and that if he should receive the amount of the said judgment, and the said judgment be afterwards reversed and set aside, your orator would be utterly without hope of remedy, so far as such payment of money would be concerned.

In consideration of the premises, your orator prays as follows, to wit:

1. That the writ of subpœna may be issued in the usual
150 form, directed to each of the said defendants.

2. That the said decree may be reviewed, reversed, and set aside, and that the said award of the said referee may be vacated, set aside, and taken for naught.

3. That all the proceedings upon the said judgment or decree may be stayed and enjoined by the special injunctional order of this court.

4. That the said bill of the said Willey may be dismissed with costs.

5. That your orator may have such other and general relief as he may be entitled to have in equity and good conscience.

SAMUEL STRONG.

ENOCH TOTTEN,
Sol. for Pl'ff.

151 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Samuel Strong, being first duly sworn, do depose and say that I am the complainant in the above bill, and that I have heard the same read and know the contents thereof, and that the facts therein stated on personal knowledge I know to be true, and the facts stated on information and belief I believe to be true.

SAMUEL STRONG.

Subscribed and sworn to before me this 18th day of August, 1876.

R. J. MEIGS,
Clerk,
By J. JAY CAMP,
Assistant Clerk.

Filed Sept. 18, 1876.

152 *Answer of Willey to bill of review.*

In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL.

The separate answer of def't Charles F. Willey to the bill of review of the above named plaintiff, Samuel Strong.

This def't by protestation, not confessing any of the matters and things in said bill contained to be true in manner and form as alleged, for answer to so much and such parts thereof as he is advised it is material and proper for him to answer, answers as follows:

I admit the plaintiff's statement of my original bill and exhibits to be substantially correct, and in this connection show that said plaint-
153 iff, on the day of A. D. 187 , exhibited in this court his original bill against this def't and others, comprehending the same subject-matter; which bill this def't fully answered, as appears amongst other things from the proceedings in said cause, entitled Strong vs. Willey et als., and numbered 4,144, equity docket of the court, and that thereafter, to wit, on the day of , A. D. 187 , said cause was consolidated with this cause, and was subsequently treated as one cause.

I admit the execution of the agreement copied into said plaintiff's bill of review to refer the dispute then existing between said Strong and myself to arbitration, and upon the advice of counsel I say that said agreement transferred the law and the facts arising out of the subject of the reference to the decision of the referee named in said agreement, whose decision or word, in the absence of fraud not alleged in
154 said bill of review, was and is conclusive upon the matters submitted, and that the subsequent report or award of said referee, also copied into said plaintiff's bill of review, shows that said plaintiff was fully and fairly heard. I deny that the decree of this court ap-

proving and confirming said award (also copied into said bill of review) was or is erroneous.

Further answering, I say I am advised by counsel that said plaintiff should first perform said decree before asking this court to review the same, and I claim the same advantage of this objection as though I had formerally raised the same by special demurrer.

I further say I have no interest in said decree save that the proceeds thereof may be properly applied by Robert Campbell, of said Dis-
155 trict, to whose use the same has been entered of record, to the payment of such of my creditors as by their labor *er* material contributed to the construction of so much of said sewer as was comprehended in my contract with said plaintiff, copied into his said bill of review.

And I respectfully suggest that said Campbell is, as I am advised, a necessary party to plaintiff's bill of review; and now having fully answered, pray to be hence dismissed.

C. F. WILLEY.

I, Charles F. Willey, on oath depose and say I have heard read the foregoing answer by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

C. F. WILLEY.

156 Subscribed and sworn to before me this 8th day of December, A. D. 1876.

L. D. O'NEAL, *J. P.* [SEAL.]

Filed Dec. 8, 1876.

157 *Bill of review.*

In the supreme court of the District of Columbia.

SAMUEL STRONG *vs.* CHARLES F. WILLEY, ROBERT CAMPBELL, William Lilley, G. W. Balloch, District of Columbia; William Dennison, J. H. Ketcham, and S L. Phelps, Commissioners of the same; R. W. Taylor and J. M. Brodhead, board of audit of same, and Fitzhue Coyle, comptroller of the same, defendants.	Equity.	No. 4144.

The bill of review of Samuel Strong, the complainant in the origi-
158 nal bill in the above-entitled cause, against Charles F. Willey, Robert Campbell, William Lilley, George W. Balloch, District of Columbia; William Dennison, J. H. Ketcham, S. L. Phelps, Commissioners of the District of Columbia; R. W. Taylor and J. M. Brodhead, board of audit; Fitzhue Coyle, comptroller of said District.

The bill of review of the above named complainant respectfully shows:

First. That on the 4th day of February, 1875, this complainant exhibited his bill of complaint in this court against the above-named defendants, and thereby set forth: That the complainant made a contract with the board of public works of the District of Columbia for the construction of a sewer, and on May 6th, 1874, made an agreement in writing with said Willey, by the name of C. F. Willey & Co., to sublet the con-

struction of the unfinished part of said sewer at the price of $30.00 per lineal foot, and that the said Willey falsely represented that he
159 had a partner, and that it afterwards turned out that there was no one associated with said Willey, and thereupon security was required of and was given by said Willey for the performance of his contract with this complainant, and that Robert Campbell became surety for said Willey in the premises; and that by a memorandum attached to the paper writing signed as surety by said Campbell, it was agreed that the orders given in payment for work done and materials furnished by said Willey should be delivered to said Campbell; that said Willey continued the work for some time, and then abandoned it, and falsely represented to this complainant that he had fully completed said work according to his said agreement, and that he had completed 1,080 lineal feet, and that this complainant relying upon the truth of the representations gave orders to said Willey, which, together with those
160 already given to him and to said Campbell, amounted to the sum of $30,000.00; but that complainant afterwards ascertained that said Willey constructed only 920 feet, and that the complainant had also furnished materials and loaned money to said Willey, for which no allowance was made, amounting to 3,093.00, and that he had become responsible for materials furnished to said Willey for the sum of $175.00, and had performed work in cleaning away dirt, &c., to complete said sewer, which Willey was bound to do, for which he paid the further sum of $1,328.37, and the further sum of $150.00 for cleaning out said sewer; and that in addition to such payments the sum of $5,082.36 was paid to the laborers of said Willey by the District of Columbia, which was charged by the Commissioners of the District of Columbia against the complainant, and that the whole sums paid by the complainant to said Willey amounted to $39,753.83; that there was due to the laborers
161 of said Willey the further sum of about $4,000.00; that the said Willey and Campbell had drawn on the orders by complainant made between eighteen and nineteen thousand dollars, and fully intended to collect all of said orders notwithstanding the fact that they had both been overpaid, and that they were about to perform said act in order to enable said Willey to convey such funds beyond the limits of the District; that said Robert Campbell had furnished to said Willey about $2,500.00 worth of bricks, and that he had already received and drawn therefor over thirteen thousand dollars, and that said Campbell was endeavoring to collect the balance of $10,953.83 of orders, to enable said Willey to depart the jurisdiction of the court without making provision for the payment of the complainant; that said Willey
162 procured an injunction to restrain complainant from collecting auditor's certificates, and that the defendant Lilley procured a bond to be signed by one H. S. Johnson, upon which bond said restraining order was dissolved, except as to certain bills for labor. To save harmless said Johnson, complainant gave to said Lilley an order for certificates to the amount of $6,000.00, which said certificates were to be held by said Lilley until the liability of said Johnson should cease, when they should be returned to complainant.

On the hearing of the motion touching the injunction the same was dissolved, except as to the amount of about $2,400.00 due certain laborers, and that the liability of Johnston had ceased, but that said Lilley notwithstanding was endeavoring to collect the said $6,000; that George W. Balloch was acting as trustee for Willey and Campbell, and held the certificates, bonds, &c., belonging to the complainant,
163 and the complainant prays for process, and that said Willey,

Campbell, and Lilley be restrained from collecting from the board of audit any certificates, and that said Balloch might be restrained from paying over to Willey or Campbell any certificates, &c., belonging to complainant, and that the several officers of the District of Columbia made parties be restrained from paying to Willey, Campbell, and others any certificates, and for general relief.

Second. To the said bill of complaint the defendant Willey filed his answer, setting forth: That he admits that this complainant had made the contract with the Board of Public Works as alleged, and that he made the contract with complainant as set forth in the bill; that he proceeded diligently with the work and completed 1,089 feet, and
164 that at $30 per foot his work was worth $32,670.00; that his work was measured, and that it was satisfactory to the officers of the District of Columbia, and that this complainant received credit therefor for the sum of $43,015.75; that he quit work on the 8th of August, 1874 (except to finish some work he had begun), and that prior to said date he had received from Strong two orders of $3,000.00 each, and an order on his pay-roll for $3,523.30, which was honored for only the sum of $1,770.23, and that in all he had received from Strong in orders $6,770.23; that Strong never paid or loaned him more than $10.00, and never became responsible for materials or labor, except that he drew an order on Strong for $535.50 in favor of H. W. Blunt, which Strong accepted. But denies that complainant became responsible for him for $1,328.37 for hauling away dirt and rubbish, and admits that $5,809.37 in money was obtained by him by the sale of complain-
165 ant's certificates for $8,464.50. He also denies that he had received various sums aggrega ing $39,753.83, and also denies that Strong has ever become responsible for him for any sum except $175.00 for manhole covers and the order given to Blunt for $535.50. He admits that he and defendant Campbell are endeavoring to collect the balance of the order of Strong, but says they amount to only about $12,000.00, and not to $14,000.00 or $15,000.00, and denies that he and defendant had been overpaid. He admits that Campbell signed the bond to Strong as alleged, and says that to protect said Campbell it was agreed that Strong should give to Campbell an order on the board of public works for $3,000.00 for each 100 lineal feet of sewer constructed by Willey, and that in pursuance of such contract this complainant did deliver to Campbell orders to the amount of $23,464.56, and also that the balance due on the said orders is $12,000.00
166 and not $10,953.83, and admits that they are endeavoring to collect said sum of $12,000.00, and avers that if all the orders given by Strong to said defendant and to defendant Campbell are to be charged as payments that the balance due to said Willey from this complainant will be $4,889.93 instead of there being a balance due to this complainant as alleged in said bill. That he believes the version of the relations of this complainant with defendant Lilley as set out in the bill to be untrue, and that George W. Balloch was not a trustee as alleged, but was only representing some laborers. Separate answers to said bill were filed by the defendants Lilley and Campbell, but no proceedings have been had thereon.

Third. Afterwards a stipulation to refer the matters of difference mentioned in this cause and in equity cause No. 3904 between the
167 complainant and defendant Willey was made by this complainant and the defendant Willey in the words and figures following, to wit:

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity. No. 3904.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } Equity. No. 4144.

Matters of difference having arisen between Samuel Strong and Charles F. Willey, and the parties being desirous of a speedy and final adjustment and settlement of all such matters as are referred to or included in the bills of complaint in the above entitled causes, have agreed and hereby do agree that all such matters may be referred to the arbitrament of William Webb, of Washington City, D. C., whose decision shall be final and conclusive between the parties, and he shall
168 have full power to take such testimony as either party may produce before him, and his decision upon any and all questions that may arise during this investigation of said causes shall be final and conclusive, and the final decree of the court may be based upon his report when made, and no exceptions thereto shall be made by either party.

In witness whereof we have hereunto set our hands and seals this 5th day of May, 1875.

C. F. WILLEY. [SEAL.]
SAMUEL STRONG. [SEAL.]
CHARLES F. WILLEY & CO. [SEAL.]

Witness:
L. G. HINE,
Att'y for Chas. F. Willey.

And upon said stipulation the court on the 7th day of May, 1875, made and entered the following order, that is to say:

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity. No. 3904.

169 SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } Equity. No. 4144.

The motion of said Charles F. Willey, by his counsel, coming on to be heard to appoint William B. Webb as referee in the above entitled causes, and the stipulation of the parties thereto, this day filed, having been read and duly considered, it is this 7th day of May, 1875, ordered that said causes be referred to William B. Webb as referee to report to the court for its final action, in accordance with the stipulation of the parties this day filed.

By the court.

And the said referee then proceeded to hear the testimony of the parties in the said causes together, and the proofs being closed, he submitted the following report therein, on the 7th day of December, 1875, to wit:

170 *Report of referee.*

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity. No. 3904.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } Equity. No. 4144.

The above causes were refer'ed to me by agreement of parties, and an order of court made in conformity with that agreement. By the agreement and orders all the matters of difference arising between the said Willey and Strong which are referred to and included in the bills of complaint in the above-named causes are referred to my arbitrament, and full power is given to me to hear such testimony as either party may produce before me, and my decision upon the said matters of difference is made final.

It is not necessary for me to state here what these matters of
171 difference are, they are so fully set forth in the pleadings, and I shall content myself with stating my conclusions.

A great deal of testimony was adduced before me by both parties which I have heard and considered as patiently and carefully as it lay my power to do, and I have reached the following conclusion:

First. I am satisfied that Willey commenced the construction of the portion of the Boundary street sewer built by him under his sub-contract with Strong at a point about thirty feet east of the I street manhole, and from that point to the place where he was compelled to stop work by the District authorities; that he built one thousand and eighty-nine lineal feet.

Second. I am satisfied that Willey under the terms of his subcontract was obliged to complete the sewer entirely, and that in this was
172 included the cleaning out of the sewer, the filling up of the put-log holes, levelling of the top of the sewer, or, rather, of the street that passed along and over it, and the completing and covering of the man-holes. I think the testimony shows that Willey did clean out the portions of the sewer built by him, and I have accordingly made no charge against him for that. The put-log holes were filled by Bryant, under Strong's employment, and I have allowed what Bryant says it cost to have that work done.

With respect to the filling up or levelling of the street over the sewer, I have had some difficulty in concluding what should be a proper allowance for the work done, but I have concluded to take Mr. Edwards' figures, and have charged Mr. Willey with what I find to be his proportions of the amount contracted to be paid by Strong for that work, and
I have also charged him with the cost of the man-hole covers,
173 which is to be paid to Mr. Campbell.

Third. I have concluded that Mr. Strong is entitled to something for the use of his tools, and for the lumber and scaffolding used in the construction of the sewer, and I have accordingly, after duly considering all the testimony on that point, made such an allowance as I think is fair.

I annex a schedule or account, in which I have set out in detail the allowance and charges that appear to me to be correct. This account shows that I find Mr. Strong indebted to Mr. Willey in the sum of fifteen thousand four hundred and thirteen dollars twenty-one cents

(15,413.21), and I accordingly award that sum to Mr. Willey with costs.

1,089 feet of sewer, at $30 per foot			$32,670 00
Am't paid on pay-roll	$1,770 20		
Am't " order to Blunt	535 50		
Am't paid put-log holes	24 00		
174 Am't paid levelling	987 50		
Am't " for man-hole covers	175 00		
		$3,492 23	
			29,177 77
Payments:			
Certificates to Willey	$5,000		
" to Campbell	8,464 56		
		$13,464 56	
Balance due Willey			$15,713 21
Allowance for use of tools			300
			$15,413 21

December 7, 1875.

W. B. WEBB,
Referee.

Referee's fee, $300.

Fourth. To the said report of the referee your orator filed exceptions, which on the 14 day of January, 1876, were argued by counsel, and this court thereupon made and entered a decree in the words and figures following, to wit:

175 CHARLES F. WILLEY *vs.* SAMUEL STRONG ET AL. } 3904. Eq.

SAMUEL STRONG *vs.* CHARLES F. WILLEY ET AL. } 4144. Eq.

The above causes came on to be heard at this term upon exceptions filed by Samuel Strong on the 10th day of December, A. D. 1875, to the award of W. B. Webb, esq., referee, to whom the said causes stood referred by an order passed therein on the 7th day of May, A. D. 1875, and the same having been argued by counsel: It is thereupon this 14th day of January, A. D. 1876, ordered, adjudged, and decreed, that said exceptions be and the same are overruled, and that the said award be and is hereby approved, ratified, and confirmed.

And it is hereby further ordered, adjudged, and decreed that
176 Charles F. Willey do recover against said Samuel Strong the sum or fifteen thousand four hundred and thirteen dollars and twenty-one cents ($15,413.21), the sum awarded by said referee, and the costs and expenses incurred in said causes, and that he have execution thereof as at law.

By the court.

A. WYLIE.

And this decree this complainant insists is erroneous and ought to be reviewed, reversed, and set aside for many apparent errors and imper-

fections, inasmuch as it appears from the pleadings and exhibits in said causes, and the report of the referee and the decree made and grounded thereon, that the said Willey was to furnish the materials and perform the labor in the construction of said sewer for the sum of $30.00 per lineal foot, and that said compensation was to be paid to him by Strong
177 in orders on the board of public works, payable in sewer bonds; and that said Willey constructed 1,089 lineal feet of said sewer, which at $30 per lineal foot amounts to $32,670.00, payable in sewer bonds. And that Willey did not entirely finish said sewer, but left a part thereof unfinished, which said Strong completed. And that said Willey had received from Strong orders on the board of public works, drawn by Strong, for the sum of $26,981.00, in payment of such work and materials, and that said Willey was chargeable also with money paid by Strong for him and in the completion of work which Willey should have done the additional sum of $3,792.23, the payments amounting in the aggregate to the sum of $30,773.23, paid to Willey on account of the said work and materials. And the said award of the said referee and the said decree, notwithstanding these payments, finds and recites that there is due from this complainant to said Willey the sum of $15,413.23
178 on account of the said work done and materials furnished by said Willey on said sewer under said contract, and said decree renders judgment therefor accordingly, and awards execution thereof as at law against the complainant in favor of said Willey for said sum. And no proof being made thereof, and the said Willey in his said answer claiming that there was due to him on account of the premises only $4,899.93, no such decree ought to have been made or grounded on said proceedings.

Fifth. The board of audit, composed of the said defendants Tayler and Broadhead, has been abolished, and said two defendants have no further interest in these proceedings, nor does the said decree materially affect the rights of any of the other defendants to said cause, they not being parties thereto or in said stipulation.

179 Sixth. That the officers of the District of Columbia, against the instructions and orders of this complainant, have made a pretended settlement of all the accounts of your orator with said District on account of the work done and materials furnished in the construction of the said Boundary street sewer, and also on account of work done and materials furnished by him for said District in several other sewers and public improvements, and pretend that there is due to him only the sum of about $10,102.00; for this sum the board of audit has issued a certificate without the knowledge or consent of your orator, and have filed the same in this cause with the clerk of this court without the complainant's consent or approbation, where the same now remains; but this complainant avers that there is a large sum of money, over and above
180 the amount of said certificate, due to him from the District of Columbia on account of such work and materials.

This complainant further says that he has paid no part of the said judgment so rendered against him and in favor of the said Willey and hereinbefore mentioned, and he avers that he is not now and has not been since said judgment was rendered able to pay the same. He alleges also that the said Willey is utterly insolvent, and that if said Willey should receive the amount of the said judgment, and the said judgment be afterwards reversed and set aside, this complainant would be utterly without remedy for money so paid.

In consideration of the premises, the complainant prays as follows, to wit:

1. That the writ of subpœna may be issued in the usual form, directed to each of the said defendants.

181 2. That the said decree may be revieived, reversed, and set aside, and that the said award of the said referee may be vacated, set aside, and taken for nought.

3. That all proceedings upon the said judgment or decree may be stayed and enjoined by the special injunctional order of this court.

4. That this complainant may have such other and general relief as may be entitled to him in equity and good conscience.

SAMUEL STRONG.

ENOCH TOTTEN,
Solt. for Compl't.

182 DISTRICT OF COLUMBIA,
County of Washington, ss:

Samuel Strong, being first duly sworn, doth depose and say that he is the complainant named in the foregoing bill of complaint; that he has read the same and knows the contents thereof; that the facts therein stated on personal knowledge he knows to be true, and that the facts stated upon information and belief he believes to be true.

SAMUEL STRONG.

Subscribed and sworn to before me this 30th day of August, A. D. 1876.

R. J. MEIGS, *Clk*,
By R. J. MEIGS, JR., *Ass't.*

Filed Sept. 18, 1876.

183, 184 *Demurrer of Campbell to bill of review.*

In the supreme court of the District of Columbia.

STRONG
vs.
WILLEY ET AL. } No. 4144. Eq. doc. 15.

Demurrer of defendant Robert Campbell to the bill of review of the above named plaintiff, Samuel Strong.

This defendant, by protestation, not confessing any of the matter and things in said bill contained to be true in manner and form as the same are therein alleged, says he is advised there is good cause for demurrer to said bill, and this defendant does accordingly demur to said bill, and for ground of demurrer shews that said plaintiff has not in and

185 by his said bill of review made or stated such a case as entitles him to the relief prayed.

And for a further ground of demurrer this defendant says that on the 5th day of May, A. D 1875 (as appears in the record), it was agreed between said plaintiff and defendant Charles F. Willey that the matters of difference between them in said cause "be referred to the arbitrament of William B. Webb, esq., whose decision shall be final and conclusive between the parties, and he shall have full power to take such testimony as either party may produce before him, and his decision upon any and all questions that may arise during his investigation of said cause shall be conclusive, and the final decree of the court may be based upon his report when made, and no exceptions thereto shall be

186 made by either party." And this defendant says that pursuant

to said agreement said cause was referred to said Webb, as arbiter, who, after taking much testimony, made an award in favor of said Willey, which was subsequently approved by said court, by its decree, the subject of said bill of review. And this defendant further says that said award was within the submission, and contained the honest decision of said arbiter, after a full and fair hearing of the parties; wherefore said plaintiff is bound by said award and is estopped from impeaching the same or proceeding to review the decree of this court thereon either for errors of law or fact.

And for further ground of demurrer this defendant says he is advised said plaintiff is required to perform said decree before his
187 application for review will be entertained.

In my opinion, the foregoing demand is well in point of law.

L. G. HINE,
Counsel for Campbell.

Robert Campbell, being duly sworn, says, I have read the foregoing demurrer and know the contents thereof, and the same is not interposed for purposes of delay.

ROBERT CAMPBELL.

Subscribed & sworn to before me this 21st day of July, A. D. 1877.
[SEAL.] ROBERT I. HUGHES, *J. P.*

Filed July 23d, 1877.

188 Proceedings before the general term.

CHARLES F. WILLEY, COMPL'AIN'T,
vs.
SAMUEL STRONG, ROBERT W. TAYLER, & John M. Brodhead, def'ts, } In equity. No. 3904.

and

SAMUEL STRONG, COMPLAINANT,
vs.
CHARLES F. WILLEY, ROBERT CAMPBELL, William Lilley, George W. Balloch & others, defendants. } In equity. No. 4144.

These causes came on to be heard on a former day of the present term, upon the order of the equity court of the 26th of September, 1877, for the hearing of the bills of review and demurrer, and answers thereto, in the general term in the first instance, and were argued by counsel, whereupon, upon consideration thereof, it is by the court in general term, this 8th day of June, 1878, ordered, adjudged, and decreed
189, 190 that said bills of review be, and the same are, dismissed with costs. And from this decree the said Samuel Strong, by his solicitor, Enoch Totten, here now, in open court, prays an appeal to the Supreme Court of the United States, and the same is allowed.

191, 192 In the supreme court of the District of Columbia, the 7 day of June, 1878.

CHARLES F. WILLEY
vs.
SAMUEL STRONG ET AL. } Equity. 3904.

Know all men by these presents that we, Samuel Strong and George

E. Kirk, are bound unto the above-named Charles F. Willey in the sum of twenty thousand dollars, to be paid to the said Charles F. Willey, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 7 day of June, 1878.

Whereas the above-named Samuel Strong has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Samuel Strong shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAMUEL STRONG. [SEAL.]
G. E. KIRK. [SEAL.]

Sealed and delivered in presence of—
L. HUYCK.

Approved June 13, 1878.

DAVID C. HUMPHREYS,
Asso. Justice Supreme Court District of Columbia.

193 In the supreme court of the District of Columbia, the 7 day of June, 1878.

SAMUEL STRONG
vs.
CHARLES F. WILLEY ET AL. } 4144. Equity.

Know all men by these presents that we, Samuel Strong and George E. Kirk, are bound unto the above-named Charles F. Willey in the sum of twenty thousand dollars, to be paid to the said Charles F. Willey, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 7 day of June, 1878.

Whereas the above-named Samuel Strong has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Samuel Strong shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

SAMUEL STRONG. [SEAL.]
G. E. KIRK. [SEAL.]

Sealed and delivered in presence of—
L. HUYCK.

Approved June 13, 1878.

DAVID C. HUMPHREYS,
Asso. Justice Supreme Court District of Columbia.

194 *Authentication of record.—Clerk's certificate.*

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 28th day of June, 1878.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 28th day of June, 1878.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 28th day of June, 1878.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Assistant Clerk.

(Indorsement on cover:) No. 443. Samuel Strong, appellant, vs. Charles F. Willey; and No. 444, Samuel Strong, appellant, vs. Charles F. Willey. District of Columbia sup. court. Filed 10th July, 1878.

OFFICE SUPREME COURT U. S.
FILED
OCT 12 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

Nos. 18 and 19.

OCTOBER TERM, 1881.

SAMUEL STRONG, APPELLANT,

vs.

CHARLES F. WILLEY ET AL.

BRIEF FOR APPELLANT.

NATH'L WILSON,
For Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

SAMUEL STRONG, APPELLANT,
vs.
CHARLES F. WILLEY ET AL.

October Term, 1881.
No. 18.

SAMUEL STRONG, APPELLANT,
vs.
CHARLES F. WILLEY ET AL.

October Term, 1881.
No. 19.

BRIEF FOR APPELLANT.

STATEMENT.

These cases are here on appeal from a decree of the Supreme Court of the District of Columbia. (Record, p. 48.)

In September, 1874, Charles F. Willey, the defendant in error in cause No. 18, filed his bill in the Supreme Court of the District of Columbia, in equity, against Samuel Strong, the defendant, setting up a contract between himself and Strong, by the terms of which Strong agreed to employ Willey to construct a sewer, and to pay therefor "the sum of thirty dollars per lineal foot, the same to be

paid in orders of the said Strong on the Board of Public Works, payable in sewer bonds," and alleging the construction of 1089 feet of sewer, for which Strong became indebted to the said Willey under the terms of said contract in the sum of $32,670.

The bill further alleged that being required to give bond for the faithful performance of said contract, a further agreement was made for the protection of Willey's surety, by the terms of which Strong, as fast as sections of one hundred lineal feet of sewer were completed, was to give to one Campbell, Willey's surety, an order on the Board of Public Works for the sum of three thousand dollars.

Under these agreements orders were given by Strong in favor of Willey, or his surety Campbell, for $20,446, and for $6,535, making in all $26,891, being less, by the sum of $5,689, than the said sum of $32,670, the whole cost of the work under the contract.

The bill alleged that the orders given by Strong, and the payments made thereon, left "a balance due the complainants on the work aforesaid of $5,689, for which Strong refuses to give even an order for the payment." (Record, p. 3.)

It alleged also that these orders given by Strong had been filed with the proper authorities of the District, and had been recognized as valid assignments by said authorities, and that Strong was attempting to induce the Board of Audit to ignore the orders and to make a settlement direct with him, Strong.

The bill thereupon asked that Strong, his agents, &c., should be restrained from interfering with the Board of Audit in the settlement for the work done and the material furnished in the construction of said sewer, and from asking or receiving any certificate, bond, order, &c., for the said work done by the said Willey, and for a specific performance of the contract set up in the bill, and for general relief. (Record, p. 4.)

To this bill Strong filed his answer admitting the contract set up in the bill and the construction of a portion of the sewer charged for, and averring that he had fully complied therewith, and had given orders in favor of the complainant amounting to $30,523.30. The answer denies the indebtedness of $5,689, and also that the defendant had in any way interfered with the action of the Board of Audit in reference to the orders given by him. (Record, pp. 5–8.)

Subsequently, in February, 1875, Strong filed a bill in the same court against Willey and his surety (Campbell), the Commissioners of the District, and the Board of Audit, setting up the same contract, and averring that the defendant Willey had not complied with it, and that Willey and his surety had been paid in orders a large sum in excess of the amount due them.

The bill prayed that Willey and his surety might be enjoined from collecting, or attempting to collect, from the District authorities, and that the District authorities might be enjoined from paying any moneys, certificates, or bonds in respect of the orders given by Strong to Willey and his surety. (Record, p. 12 *et seq.*)

Willey answered, averring again the due execution of the contract on his part, denied the indebtedness charged in the bill, and stated in detail the dates and orders on the District authorities which he and his surety had received from Strong, some of which were then before the Board of Audit.

In his answer he makes the following distinct statement:

"I say that I am not indebted to complainant in any sum whatever, but that the complainant is indebted to me in the sum of $16,899.93, unless the orders aforesaid, now before the Board of Audit, shall be considered payment, in which event he is indebted to me in the sum of $4,899.93." (Record, p. 26.)

Issues having been joined, both causes were referred to a special referee under the following stipulation:

Charles F. Willey
vs.
Samuel Strong *et al.* } Equity No. 3904.

Samuel Strong
vs.
Charles F. Willey *et al.* } Equity No. 4144.

Matters of difference having arisen between Samuel Strong and Charles F. Willey, and the parties being desirous of a speedy and final adjustment and settlement of all such matters as are referred to or included in the bills of complaint in the above-entitled cause, have agreed, and hereby do agree, that all such matters may be referred to the arbitrament of William B. Webb, of Washington city, D. C., whose decision shall be final and conclusive between the parties, and he shall have full power to take such testimony as either party may produce before him, and his decision upon any and all questions that may arise during his investigation of said causes shall be final and conclusive, and the final decree of the court may be based upon his report when made, and no exception thereto shall be made by either party.

In witness whereof we have hereunto set our hands and seals this 5th day of May, 1875. (Record, p. 28.)

The following is the award of the referee:

"The above cases were referred to me by agreement of parties and an order of court made in conformity with that agreement. By the agreement and order all the matters of difference arising between the said Willey and Strong which are referred to and included in the bills of complaint in the above-named causes are referred to my arbitration, and full power is given me to hear such testimony as either party may produce before me, and my decision upon said matters of difference is made final.

It is not necessary for me to state here what these matters of difference are, they are so fully set forth in the pleadings, and I shall content myself with stating my conclusions. A great deal of testimony was adduced before

me by both parties, which I have heard and considered as patiently and carefully as it lay in my power to do, and I have reached the following conclusions:

First. I am satisfied that Willey commenced the construction of the portion of the Boundary street sewer built by him under his subcontract with Strong at a point about thirty feet east of the I street manhole, and from that point to the place where he was compelled to stop work by the District authorities that he built one thousand and eighty-nine linear feet.

Second. I am satisfied that Willey, under the terms of his subcontract, was obliged to complete the sewer entirely, and that in this was included the cleaning out of the sewer, the filling up of the putlog holes, the levelling of the top of the sewer, or rather of the street that passed along and over it, and the completing and covering of the manholes. I think the testimony shows that Willey did clear out the portion of the sewer built by him, and I have accordingly made no charge against him for that. The putlog holes were filled by Bryant under Strong's employment, and I have allowed what Bryant says it cost to have that work done. With respect to the filling up or levelling of the street over the sewer, I have had some difficulty in concluding what should be a proper allowance for the work done, but I have concluded to take W. Edwards's figures; have charged Mr. Willey with what I find to be his proportion of the amount contracted to be paid by Strong for that work, and I have also charged him with the cost of the manhole covers, which is to be paid to Mr. Campbell.

Third. I have concluded that Mr. Strong is entitled to something for the use of his tools and for the lumber and scaffolding used in the construction of the sewer, and I have accordingly, after duly considering all the testimony on that point, made such an allowance as I think is fair.

I annex a schedule in account in which I have set out in detail the allowances and charges that appear to me to be correct. This account shows that I find Mr. Strong indebted to Mr. Willey in the sum of fifteen thousand four hundred and thirteen dollars and twenty-one cents,

($15,413.21), and I accordingly award that sum to Willey with costs.

1,089 feet of sewer, at $30 per foot		$32,670 00
Amt. paid on pay rolls.....	$1,770 23	
Amt. " ord'r to Blunt.	535 50	
Amt. " putlog holes.....	24 00	
Amt. " levelling.....	987 50	
Amt. " for manhole covers.....	175 00	
		3,492 23
		$29,177 77
Payments:		
Certificates to Willey.....	$5,000	
" to Campbell.	8,464 56	
		13,464 56
Balance due Willey.....		$15,713 21
Allowance for use of tools.....		300 00
		$15,413 21

Dec. 7, 1875.

W B. WEBB, *Referee.*

Referee's fee, $300.

Filed Dec. 7, 1875."

Upon exceptions taken to this award it was affirmed by the court, and a decree was passed that Willey recover against Strong the sum of $15,413.21, the sum awarded by the referee, and costs and expenses, and that he have execution therefor. (Record, p. 31.)

Thereupon the said Strong filed in each of said cases his bill of review, reciting the contract, the payments, and the proceedings hereinbefore stated, and averring that said decrees were erroneous, and ought to be reversed and set aside for the following errors and imperfections apparent on their face:

"1. That said Willey, for the cause set forth in his said bill of complaint, had a full, adequate, and perfect remedy at law, and that said bill ought to have been dismissed.

2. That said Willey was to furnish the materials and perform the labor in the construction of said sewer for the sum of $30 per linear foot, and that said compensation was to be paid to him by Strong in orders on the Board of Public Works, payable in sewer bonds; and that said Willey constructed 1,089 linear feet of said sewer, which, at $30 per linear foot, amounts to $32,670, payable in sewer bonds; and that Willey did not entirely finish said sewer, but left a part thereof unfinished, which said Strong completed; and that said Willey had received from Strong orders on the Board of Public Works, drawn by Strong, for the sum of $26,981, in payment of such work and materials, and that said Willey was chargeable also with money paid by Strong for him, and in the completion of work which Willey should have done, the additional sum of $3,792.23, the payments amounting in the aggregate to the sum of $30,773.23, paid to Willey on account of the said work and materials. And the said award of the said referee and the said decree, notwithstanding these payments, finds and recites that there is due from your orator to said Willey the sum of $15,413.23, on account of the said work done and materials furnished by said Willey on said sewer under said contract, and said decree renders judgment therefor accordingly, and awards execution therefor, as at law, against your orator in favor of said Willey for said sum. And no proof being made thereof, and the said Willey, in his said bill of complaint, claiming that there was due to him on account of the premises only $4,899.93, no such decree ought to have been made or grounded on said proceedings.

5. The said Board of Audit, composed of the said Taylor and Brodhead, has been abolished or discontinued, and the said parties have no further interest in these proceedings.

6. That the officers of the District of Columbia, against the instructions and orders of your orator, have made a pretended settlement of all the accounts of your orator with said District, on account of the work done and materials furnished in the construction of the said Boundary street sewer, and also on account of work done and materials furnished by him for said District—several other sewers and public improvements—and pretend that there is due to him only the sum of $10,102. For this sum the Board of Audit has issued a certificate without the knowledge or

consent of your orator, and have filed the same in this cause, with the clerk of this court, without your orator's consent or approbation, where the same now remains. But your orator avers that there is a large sum of money, over and above the amount of said certificate, due to him from the District of Columbia on account of such work and materials." (Record, p. 37.)

The bill of review then concludes:

"Your orator has paid no part of the said judgment so rendered against him and in favor of the said Willey, and hereinbefore mentioned, and he avers that he is not now, and has not been since said judgment was rendered, able to pay the same. He further avers that the said Willey is utterly insolvent, and that if he should receive the amount of the said judgment, and the said judgment be afterwards reversed and set aside, your orator would be utterly without hope of remedy, so far as such payment of money would be concerned.

In consideration of the premises, your orator prays as follows, to wit:

1. That the writ of subpœna may be issued in the usual form, directed to each of the said defendants.

2. That the said decree may be reviewed, reversed, and set aside, and that the said award of the said referee may be vacated, set aside, and taken for naught.

3. That all the proceedings upon the said judgment or decree may be stayed and enjoined by the special injunctional order of this court.

4. That the said bill of the said Willey may be dismissed with costs.

5. That your orator may have such other and general relief as he may be entitled to have in equity and good conscience.

SAMUEL STRONG.

ENOCH TOTTEN, *Sol. for Pl'ff.*"

To this bill of review an answer which was in substance and effect a demurrer. (Record, p. 39.)

Both causes were heard in the Supreme Court of the District in General Term, in the first instance, and it was by

that court ordered, adjudged, and decreed that said bills of review should be dismissed. (Record, p. 48.)

Appeals were thereupon taken to this court.

Assignment of Errors.

The court below erred in dismissing the bills of review.

Argument.

The bills were filed to review two decrees for errors of law apparent on their face.

These errors were:

First. The decrees did not dispose of the issues raised by the pleadings; and

Second. The decree was for the payment of a sum of money greatly in excess of that claimed by the complainant in his original bill.

The original bill was filed to obtain the specific performance of a written contract, and to enjoin the defendant Strong from interposing to prevent the execution of that contract.

The bill filed by Strong was to obtain credit for certain orders delivered and payments made to Willey, and to enjoin Willey from receiving from the District authorities the securities which he claimed he had a right to receive under his contract with Strong.

The real and only controversy between the parties to both bills was as to the quantity of work done by Willey and the amount of bonds or securities that he was entitled to receive from Strong.

There was no claim in the bill of Willey, nor in his answer to Strong's bill, that the work Willey did under the Strong contract was to be paid for in money. Willey did not ask for a money decree, but only that Strong should be required to perform his agreement to pay in sewer bonds

or such other securities as the District authorities might pay to Strong.

The issues made by the pleadings related exclusively to this controversy, and to the disposition to be made of the securities then in the hands of the District authorities.

The bill of review states that there is now on file in the court below a certificate for $10,102, as being the amount due for the construction of the sewer mentioned in the contract with Willey. This certificate was issued and filed without Strong's knowledge or consent, and its ownership has not yet been decided.

The pleadings did not raise any issue as to the amount of *money* due from Strong to Willey, except one that was dependent upon a decision as to the person entitled to certain securities then in the hands of the District authorities.

The decree of the court did not, however, settle or determine, or even refer to, any of the issues raised by the pleadings.

Although it disposed of both cases, it determined nothing but that Strong was indebted to Willey in the sum of $15,413.21.

The ownership of the bonds then held by the District authorities it did not determine.

The de ree of the court followed the award of the referee, which it affirmed.

A decree that fails to dispose of matters of equity raised by the pleadings is erroneous on its face, and may be reversed. (Moore *v.* Huntington, 17 Wall., 417.)

Whether such a decree is final upon the report of a master or the award of a referee, it is equally a subject of review.

For the purpose of examining all errors of law, the bill, answer, and other proceedings are, in our practice, as much a part of the record as the decree itself.

These bills of review were filed by Enoch Totten, Esq., and the cases were argued by him in the court below.

The points and authorities presented by him to the court below are here presented without further argument:

A bill of review will lie for errors of law apparent upon the face of the decree. (2 Daniel's Ch. Pr., 1630; Story's Eq. Pl., § 404.)

For the purposes of a bill of review the "decree" includes the bill, answer, and other proceedings, and they are as much a part of the record before the court as is the "decree" itself. (2 Daniel's Ch. Pr., 1630 note, 1632 and note; Story's Eq., § 407 and note.)

A bill of review for error apparent on the record may be filed without leave of court. (2 Daniel's Ch. Pr., 1633; Story's Eq. Pl., § 405.)

To entitle a person to file a bill of review he should have obeyed the decree. This is the rule of the High Court of Chancery of England. We have no such rule. But this rule will be relaxed in special cases, even where the rule exists; that is, when the party is insolvent; when he has given security for the performance; when any act is to be done which would extinguish the party's rights at the common law, such as delivering a release, acknowledging satisfaction, cancelling bonds or evidences, and the like. In such cases, those parts of the decree are to be spared until the bill of review shall have been determined. (2 Daniel's Ch. Pr., 1634 and note, 1635; Story's Eq. Pl., § 406 and note. See also Partridge *v.* Osborn, 5 Russell, 195.)

On a bill of review for errors of law apparent upon the record, we cannot look into the evidence in bulk, but the case must stand upon the pleadings and proceedings. (Story Eq. Pl., sec. 407; 2 Danl. Ch. Pr., 1632 and note 3.)

It is a good ground for a bill of review if the decree was not warranted by the allegations of the bill. (Story Eq. Pl., sec. 405; Goodhue *v.* Churchman, 1 Barb. Ch., 596.)

A complainant in equity cannot obtain a decree for more than he has asked for in his bill. The relief must be agree-

able to the case made by the bill; relief which is inconsistent with, or certainly different from that which is prayed, cannot be granted. "It is certainly a correct principle that the court cannot decree to a plaintiff—whatever he may prove—more than he claims in his bill." (Simms *v.* Guthrie, 9 Cranch, 19; English *v.* Foxall, 2 Peters, 595; Boone *v.* Childs, 10 Peters, 177; Hobson *v.* McArthur, 16 P., 182; Wilson *v.* Graham, 4 Wash. C. C. R., 53; Vattier *v.* Huide, 7 Peters, 252; Crocket *v.* Lee, 7 Wheaton, 522; Jackson *v.* Ashton, 11 P., 229; James *v.* McKernon, 6 Johns., 559.)

The stipulation of the parties by which the matters of difference were referred to the referee in this cause contains the agreement that the decision of the referee "shall be final and conclusive between the parties," and also that "his decision upon any and all accounts that may arise during this investigation of said causes shall be final and conclusive; and the final decree of the court may be based upon his report, when made, and no exceptions thereto shall be made by either party."

Such a stipulation does not take the case beyond the reach of the courts, and the award of the referee may be set aside for the ordinary rules which prevail in courts of justice upon such matters. In the case of United States *v.* Farragut, 22 Wall., 406, the decision of the court sustained this view. The reference was made there by virtue of a stipulation of counsel and an order of the court to the effect that the award of the referees should "be final upon all questions of law and fact involved in these causes." It was further provided in the reference that the award was to be entered as a rule and decree of the court. The Supreme Court of the United States, in passing upon the question of the finality and binding force of the award made by the referees in that case, uses this language:

"Nor do we conceive, notwithstanding the expression in the agreement of submission, that all questions of law in the case are concluded by the award. In this respect it is

no more than a submission of all matters involved in the suit.

"Where the award finds facts, it is conclusive; where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one is made, could have been corrected in the court below, and can be corrected here. Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be distinctly shown, the parties must abide by the award.

"The award was also liable, like any other award, to be set aside in the court below for such reasons as are sufficient in other courts—for exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery."

The decree complained of should be canceled and set aside for the above reasons.

NATH'L WILSON,
For Appellant.

OFFICE SUPREME COURT U.S.
FILED
OCT 12 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

SAMUEL STRONG, APPELLANT, *vs.* CHARLES F. WILLEY.	No. 18.
SAMUEL STRONG, APPELLANT, *vs.* CHARLES F. WILLEY.	No. 19.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEE.

In 1873 appellant contracted with the late Board of Public Works of this District to construct what is commonly known as the "Boundary-street sewer," along the north-eastern line of this city. On the 6th day of May, 1874, Strong sublet a part of this work to Willey, under the subcontract set out on page 2 of the record.

Disputes between the parties arose under that subcontract and this litigation began. On the 5th day of May, 1875, after the parties had been in court more than seven months, they submitted their differences to the arbitrament of William B. Webb, (see submission, Record, pp. 28–9,) whose decision they agreed should be "final and

conclusive" between them and should be the basis of the final decree of the court in the causes.

The referee made his award (Record, pp. 35-6-7), and the court entered a final decree upon it (Record, p. 37), and Strong seeks by his bill of review to "revise and set aside" that award, chiefly because the referee proceeded on the theory that Willey was to be paid money, whereas by the contract he was to be paid in "sewer bonds" of the District of Columbia.

By reference to the contract between the parties, (Record, p. 3,) it will be observed that Willey was to be paid for his work at the rate of "thirty dollars per lineal foot, the same to be paid in orders of the said Strong on the Board of Public Works, payable in sewer bonds." This provision of the contract plainly meant no more than this: that Willey was to finish the sewer for $30 per lineal foot and take his pay in sewer bonds, that is to say, he was to get as many sewer bonds as was equivalent to the amount of the work he should do at the rate of $30 per lineal foot, so that it made no practical difference to Strong whether Willey took his pay in money or sewer certificates, and this would seem to be the construction the parties themselves placed upon the contract, for we find Strong, on the 5th of May, 1874, the day before the contract was formally executed, giving an order on the Board of Public Works for *three thousand dollars* on account of the work.—(Record, p. 3.) Congress, on the 20th day of June, 1874, prohibited the further issuance of sewer certificates by the Board of Public Works, and Strong never subsequently to that time asked to be relieved from the provision in his contract, requiring him to pay for the work in sewer bonds, but afterwards gave Willey eight orders on the Board of Public Works, payable in money, amounting to $23,464.50, on account of the work, thereby waiving the provision for payment in sewer bonds.—(Record, p. 25.) In the seventh paragraph of his answer to Willey's bill (Record, p. 6), Strong says: "By the terms of this contract this defendant

obligated himself to give to the complainant an order on the Board of Public Works for the sum of three thousand dollars on the completion of each one hundred feet of said sewer." The question was not raised by Strong, either in his bill against Willey, his answer to Willey's bill, or in his exceptions to the award of the referee, and was undoubtedly an afterthought with him.

POINTS.

1. Appellant has no standing here, because the decree complained of, being for the payment of $15,413.21 in money, should have been paid or secured to be paid before the bill of review was filed.

Story Eq. Pl., § 406.
2 Dan. Ch. Pr. (4th ed.), 1,582.
2 John Ch., 488 (Wiser vs. Blackley).

Appellant has disregarded this rule. He avers, in the sixth paragraph of his bill of review, that the District of Columbia owes him a large sum of money over and above a board of audit certificate for $10,102 filed in this case *against his consent.* There is no offer to perform the decree or any part of it. The money is all due and should long ago have been paid.

Ricker vs. Powell, 100 U. S., 104.

2. The award was within the submission, and there is no intimation of fraud or improper conduct on the part of the referee. The questions presented by appellant's bill are not open for examination and review in this court.

In the case of *Campbell vs. Boyreau,* (21 How., 223,) this court, speaking by Mr. Chief Justice TANEY, said:

"If, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. . . . And this court cannot regard facts found by the judge as having been judicially determined in the court below, there